No. 12442

United States
Court of Appeals
For the Ninth Circuit

JOHN I. HAAS, INC., a corporation,
Appellant,
vs.
O. L. WELLMAN,
Appellee.

Brief for Appellee

Upon Appeal from the United States District Court for the District of Oregon.

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SUBJECT INDEX

SUBJECT INDEX—Continued

SUBJECT INDEX—Continued

TABLE OF CASES AND OTHER AUTHORITIES

Decisions

(The asterisks indicate the hop cases)

TABLE OF CASES AND OTHER AUTHORITIES —Continued

Statutes and Rules

Other Authorities

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STATEMENT OF THE CASE

This is an action to recover the balance due on the purchase price of one-half of a specific hop crop which defendant-appellant bought under contract from plaintiff-appellee.

The action was commenced in the Federal Court, which had jurisdiction under the statute which is now 28 U.S.C. §1332. The amount in controversy exceeds $3,000, exclusive of interest and costs. The parties are citizens of different States in that plaintiff-appellee is a citizen of Oregon, and defendant-

appellant is a Delaware corporation. (Appendix, post, p. i.)

Both parties waived jury trial, and all issues were tried by the Court. The Court thereafter entered judgment for plaintiff-appellee, based upon findings of fact and conclusions of law (W.R. 8-18).

Consolidation of Records

This is a companion case to two others with which it was tried in the District Court and with which it is now on appeal to this Court, to-wit, Hugo V. Loewi, Inc., Appellant, vs. Geschwill, Appellee, No. 12440, and Hugo V. Loewi, Inc., Appellant, vs. Smith, Appellee, No. 12442. As indicated in appellee Geschwill's brief (pp. 2-3) and also in appellee Smith's brief (pp. 2-3) the Court has permitted a certain consolidation of the record and of the briefs in the three cases.[1]

This case is like the other two in that it involves 1947 Oregon cluster hops, the background and practices of the hop trade that year, and similar matters. It is unlike the other two cases, however, in that it involves a different buyer-appellant, a term purchase contract rather than one made just before harvest, and a finding by the trial Court that the

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1 In order to avoid unwieldly references, the following abbreviations are used to refer to the various parts of the consolidated record:

G. R.—"Geschwill Record," meaning that portion of the consolidated record printed in the case of Hugo V. Loewi, Inc. v. Geschwill, No. 12440.

S. R.—"Smith Record," meaning that portion of the consolidated record printed in the case of Hugo V. Loewi, Inc. v. Smith, No. 12441.

W. R.—"Wellman Record," meaning that portion of the consolidated record printed in the case of John I. Haas, Inc. v. Wellman, No. 12442.

hops were not only acceptable but were in fact accepted.

Pursuant to the Court's permission, and following appellant's example, we shall incorporate herein by reference certain portions from each of the appellees' briefs in the other two cases. This will leave for discussion in this brief just the particular core of the controversy about this particular case and hop crop.

Specifications of Asserted Error

Appellant's specifications of asserted error (Br. 20-32) differ in some material respects from the points designated by appellant as those upon which it would rely (W.R. 30-42). Several asserted errors have been added,[2] and several have been abandoned.[3]

Appellant did not bring up the whole record (W.R. 43-44), but the substantial omissions were in large part supplied by appellee's cross-designation (W.R. 46-47). We do not know whether the Court will feel at liberty to consider appellant's

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2 Two new specifications of asserted error, not mentioned in the designated points, appear as separate paragraphs Nos. 2 (Br. 20-21) and 32 (Br. 32).

The following specifications of asserted error question additional findings or parts of findings not mentioned in the designated points: Specification No. 5 (Br. 21-22) is an expansion of designated point No. 5 (W.R. 31); specification No. 6 (Br. 22) includes matter not in point No. 6 (W.R. 31); specification No. 12 (Br. 24-25) is an expansion of point No. 15 (W.R. 33); specification No. 15 (Br. 26) includes matter not mentioned in point No. 19 (W.R. 34); specification No. 18 (Br. 27) is an expansion of point No. 22 (W.R. 35); specifications Nos. 22 and 23 (Br. 29) are a division and expansion of point No. 26 (W.R. 36).

Specification No. 28 (Br. 31) seeks to correct point No. 32 (W.R. 37), and specification No. 31 (Br. 32) changes the statement in point No. 35 (W.R. 37).

3 The designated points on which appellant no longer relies are Nos. 2 in part, 3, 11, 12, 14, 28, 36 through 51.

newly-asserted errors.[4] In order that the matter may be available for the Court's consideration, however, we shall discuss all of appellant's arguments including those which represent a change of position.

The first twenty-five of the thirty-two specifications of asserted error are directed to the findings of fact of the District Court. For the purpose of showing in an orderly form that they are supported by the evidence, the findings of fact are set out in their entirety in the Appendix to this brief with citations to the record on each contested point.

The Issues

Three "ultimate" issues are proposed by appellant (Br. 4):

(1) *Issue on acceptance of the hops.* In his memorandum of decision the trial Court stated (W.R. 8):

> "I find that the buyer weighed the hops and 'took them in,' without imposing any conditions. By the custom of the trade, this constituted acceptance and makes the buyer liable for the contract price."

(And see findings of fact, and supporting evidence in Appendix, post, pp. xi-xxiv.)

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4 Rule 75(d), Federal Rules of Civil Procedure, provides in part: "If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal." And see *Jesionowski v. Boston & Maine R. Co.*, 329 U.S. 452, 458-459, 67 S. Ct. 401, 91 L. Ed. 416; *Ritchie v. Drier*, App. D.C., 165 F. 2d 238, 240, cert. den. 334 U.S. 860, 68 S. Ct. 1518, 92 L. Ed. 1780; *Bennett v. Scofield*, 5 Cir., 170 F. 2d 887, 889.

Appellant denies the acceptance (Br. 47-66). Appellant claims that the evidence is not sufficient in quantity to prove the custom that weighing hops is acceptance, but appellant admits that if the custom is established there is evidence "that the parties did not agree upon any deviation from it" (Br. 53). Appellant also claims that the inspection, sampling, marking and weighing of the hops at the warehouse did not constitute an "inspection."

(2) *Issue on quality of the hops.* The trial Court found that the hops substantially conformed to the quality provisions of the contract (Appendix, post, pp. xxxiv-xxxvi).

Appellant claims that it rejected the hops and that they were not "prime quality" because of mildew and leaf-and-stem content (Br. 34-46).

(3) *Issue on form of action.* The trial Court decided (W.R. 17) that under Oregon law the measure of appellee's recovery upon the facts was the balance of the contract price, after deducting the advance payment and the proceeds on resale.

Appellant denies (upon the same grounds as in the Geschwill case) that the grower can recover the contract price in this action (Br. 66-74). Appellant also claims that the contract price should be deemed to be the minimum of 45 cents a pound, instead of the market price of 82 cents a pound as found by the trial Court, because the buyer's representative confirmed the selected market price orally rather than in writing (Br. 41-44).

Narrative Statement

We believe that the determinative facts are as found by the trial Court, and accordingly we differ widely with appellant's statement of the case. Most of the differences, however, appear in detail from the references to the supporting evidence set out in the Appendix hereto, and it does not seem necessary to reiterate here either the findings or the supporting evidence. Instead, without cataloging what we believe to be the inaccuracies in appellant's statement, we shall fill in some of the background relating to the ultimate issues. (This is in addition to the general material in appellee Geschwill's brief, pp. 5 et seq., and in appellee Smith's brief, pp. 12 et seq.)

The appellant buyer here, John I. Haas, Inc., is one of the large hop dealers in the country, and has its main office in the East. Its activities in Oregon include the operation of three hopyards, the buying of large quantities of hops from growers, and trading with other dealers. Mr. Ray personally supervises the operation of appellant's Oregon hopyards. In addition, Mr. Ray's corporation, A. J. Ray & Son, is the Oregon agent for appellant in buying hops, having represented appellant since about 1917 and having in recent years operated solely as appellant's representative.[5] As Mr. Ray said, "we buy

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5 Examples of the scope of the representation include the following: In W. Ex. 3-s appellant wrote the Ray company, "you, as our agent must point out the facts to the growers." In W. Ex. 3-f appellant telegraphed the Ray company, "you can fix prices" on contracts calling for a floor price or the market price, whichever was higher. In Ex. 3-c appellant wrote, "The matter of raising or lowering the amount [of advances] to any grower is a matter entirely in your hands." The Ray company does all the buying of hops in Oregon for

and contract hops for the defendant [appellant] in the State of Oregon and also look after the shipment of those hops." Advances to growers on hops contracted by appellant, and final payments for the hops purchased, are made to the growers by the Ray company and never directly by appellant. (W. R. 163-165, 188-189, 216, 218-220, 256, 383, 417, 442-443, 455-456, 460.)

The contract here was negotiated with Mr. Wellman for appellant by Mr. Noakes. Mr. Noakes is the vice-president of the Ray company, as well as a stockholder and director. At the time of trial he had been with the company for over thirty-six years and had been manager of its Salem office for twenty-one years. Mr. Wellman had dealt with Mr. Noakes representing appellant for some years, and all of Mr. Wellman's dealings under this series of contracts were with Mr. Noakes[6] or his assistants, Mr. Davis and Mr. Troxel. (W.R. 59-62, 94, 121, 164, 276-277, 299-300, 312-313, 417; W. Ex. 1-A.)

In 1944 appellant contracted with Mr. Wellman for the purchase of one-half the salable crop of both fuggle and late cluster hops from his hopyard over a five-year period. A series of contracts, each

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appellant (W.R. 219). Acting for appellant the Ray company negotiates hop contracts, makes spot purchases of hops, ships the hops purchased, examines hop crops under contract, makes advances to the growers, obtains and records the chattel mortgages on hop crops under contract, and inspects and samples hops (W.R. 220).

6 Mr. Noakes' functions included the buying, receiving, weighing, and shipping of hops, examination of the various yards under contract, issuing checks for and making advances to growers, making spot purchases, generally supervising the servicing of contracts, and issuing checks to growers in payment of their hops. (W.R. 276-277, 312-313, 417.)

relating to one year, were executed at that time, and the one involved here is for 1947. It shows "an equal quantity [the other one-half of the crop] sold to S. S. Steiner, Inc." Mr. Eismann, local manager for the Steiner company, explained the division of the crop between the two firms by saying, "We were both trying our best to buy the crop; at the time Mr. Wellman finally decided to split it." (W.R. 59-60, 299-300, 312, 383; W. Ex. 1-A.)

In 1947 Mr. Noakes found that the care and cultivation of Mr. Wellman's yard was "very good" (W. R. 300, and see 131, 358). However, the rainy weather in the late summer brought mildew to Mr. Wellman's yard just as it did to most of the hop-yards in the Willamette Valley (W.R. 340). Mr. Haas came out to Oregon at that time (W.R. 221), and appellant was fully advised of the situation (W.R. 340). Indeed, on August 14th the Ray company wrote appellant (W. Ex. 3-b) that in looking over Mr. Wellman's yard they were not hopeful of much of a cluster delivery and that it remained to be seen what happened "now that we are having hot weather."

With the better weather the condition of Mr. Wellman's cluster crop improved with respect to the mildew. "Some burrs in the yard made a second growth; some of the arms came out and produced hops" (W.R. 102). This improvement was generally true in the valley, particularly in such well-tended yards (G.R. 247, 265-266).

Part of Mr. Noakes' job was to make a survey of the yards on which appellant had contracts to see "what the crop would be" (W.R. 277). Mr. Noakes went through Mr. Wellman's cluster yard before picking,[7] and found "there was considerable mildew all through the yard" and "there was only small sections that were reasonably free from infection" (W.R. 279). Mr. Noakes knew that where the mildew was general in the yard that way "it would show in the sample" (W.R. 318). Mr. Noakes told Mr. Wellman he thought the yard should be picked, and with Mr. Ray's approval made the picking advance (W.R. 175, 303, 407), which was duly reported to appellant (W. Ex. 3-d).

Because the crop was lighter, and because Mr. Wellman had some money on hand, they agreed upon a smaller picking advance than usual with the understanding that Mr. Wellman could have more if he needed it (W.R. 303, 398).

Because of the lack of picking machines in Oregon most of the growers were required to pick by

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7 The contract (W. Ex. 1-A) provides in part: "* * * and provided further, that before, at or during the time of picking of said hops the Buyer shall have the right to examine the condition of the growing hops to determine whether the same are at such time in the condition in which they should be to produce the quality and/or quantity called for by the terms of this agreement; and should there be a dispute [arbitration is provided for]; and if it shall be determined that the growing crop is not in condition to produce the quality and/or quantity called for by this contract, then the Buyer shall be released from any obligation to furnish money as called for by this contract; * * *"

As the Oregon Court said of such a clause in the hop contract in *Livesley v. Johnston,* 45 Or. 30, 48, 76 Pac. 13, 946, 65 L.R.A. 783, 106 Am. St. Rep. 647: "It was not left to the mere option of Livesley & Co. [the buyer] to advance such funds as and when they saw fit, but they or their agent must pass an honest judgment as to whether or not the crop is in the proper condition; that is, for the production of such hops as is bargained for."

hand and there was a scarcity of good pickers. The result was that the picking was somewhat high in leaf-and-stem content. Thus, some of appellant's own clusters ran 10% leaf-and-stem content, Mr. Ray had a substantial quantity at 11% and some at 12%, and appellant in fact took clusters that year with 13% and 14%. Though the official analysis on Mr. Wellman's clusters (11%) was not then known, after harvest and before the acceptance Mr. Wellman and Mr. Noakes observed that the picking was somewhat "rough" and Mr. Wellman expected to take the standard market-price deduction of one cent a pound for each one per cent leaf-and-stem content over eight per cent. (W.R. 78-79, 113, 302, 344-345, and Appendix, post, pp. xxvi-xxx.)

Picking by hand, however, had one advantage in such a yard as Mr. Wellman's—the pickers could, and did, leave the badly mildewed arms and vines unpicked. Thus, a substantial quantity of the mildew was left in the yard, and the hops in the bales showed less mildew than they had on the vines.[8] (W.R. 131-132, 403-404, and Appendix, post, pp. v-viii.)

In accordance with the contract and the practice of the parties in prior years, the hops were delivered at Mt. Angel, Oregon, in Schwab's warehouse, the

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8 In appellant's brief (pp. 9-10) counsel refer to an estimated 64 bales, or about one-sixth of the crop, which it was not possible to harvest and bale separately. Those hops were from the hill yard and were less affected by mildew than some of the others. At first Mr. Wellman thought they could be kept separate from the others, but the baling crew could not keep up with the four picking sections and it was necessary to put the other kilns of hops on top of those in the storeroom. (W.R. 396-397, 408-409.)

only bonded warehouse in Mt. Angel. (W.R. 71, 75, 241-242, 305-306; G.R. 100, 344.)

About September 11th Mr. Wellman called Mr. Noakes on the telephone and selected the then market prices as the contract prices for his hops. They agreed that the market was 90 cents for fuggles and 85 cents on the sliding scale for clusters. In accordance with the established practice of the parties the buyer confirmed the selected prices orally rather than in writing. As Mr. Noakes testified (W.R. 304):

> "Mr. Wellman asked if it was necessary to put it in writing, and I told him I didn't think it was necessary; that we had not done it in previous years, and it would mean a trip back home or to Mt. Angel, and I said, 'If that is okeh with you, it is all right with me.' A good share of our business is done that way."

Appellant authorized its agent to fix the price for clusters on such contracts at 85 cents on the sliding scale. Appellant was notified of the telephonic price selections, did not object to them, and eventually paid the price so selected for the fuggles. (W.R. 71, 177-178, 228-229, 303-304, 317; W. Exs. 3-f, 3-q; Appendix, post, pp. xxiv-xxix.)

Mr. Davis had sampled the clusters for appellant on three occasions, once when he was out to the yard inspecting the harvested hops in the dry-kiln and storeroom, once again at the farm, and then later after the hops were in the warehouse. Such samples were duly forwarded to appellant's Eastern office, and Mr. Haas examined such a sample

in Mr. Ray's office, after harvest and before the acceptance at the warehouse.[9] (W.R. 73-75, 349-350, 247; W. Ex. 3-e.)

Mr. Wellman ordinarily went hunting in the fall and he wanted to have the hops taken in so that he could get the hop business off his mind and go on a real hunting trip. Accordingly he asked Mr. Noakes to make his inspection, and Mr. Noakes arranged to do so (W.R. 306, 399).[10]

The inspection was made on September 25th and, even though he had two assistants, it took Mr. Noakes practically all day to inspect appellant's one-half of the crop. The warehousemen first lined the bales up and divided them equally between the platform on which Steiner's men were working and the platform on which appellant's men were work-

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9 Appellant's evidence indicates that, as between the buyer and its agent, the buyer in the usual case would express its opinion of the hops on the basis of such samples (W.R. 234-235). Upon the full inspection, then, it was Mr. Noakes' job "to see that the crop ran and was like the type sample;" and, if he found that the tryings and tenth-bale samples measured up to the type sample, he weighed the hops (W.R. 325).

The Ray company was authorized to inspect hops tendered to appellant, Mr. Ray had Mr. Noakes make this inspection, and the hops were weighed at that time (W.R. 165, 311).

It appears that appellant and its agent wanted to deviate from the usual practice by inspecting, marking and weighing the bales without committing itself. Appellant now seems to contend that its wishes in this respect, even though not communicated to Mr. Wellman, are binding on him.

10 On trial appellant's principal contention seemed to be an affirmative defense that there was some agreement between Mr. Noakes and Mr. Wellman that the inspecting, marking and weighing of the hops would not constitute an acceptance in accordance with the trade custom. The Court found to the contrary. On brief (p. 53) appellant admits that if the custom is established, "it is acknowledged that there is some evidence that the parties did not agree upon any deviation from it;" and we understand that that issue is no longer in the case.

See the citations to the evidence collected in Appendix, post, pp. xix-xxii.

ing. The warehousemen's division of the bales was made in the usual manner and was acceptable to appellant.

The next step in the procedure was the examination of tryings from all the bales. As Mr. Noakes explained (W.R. 286-287):

> "After the hops were lined up, we would go through them with triers and draw a sample handful out of each and every bale, and place that handful of hops on the head of the bale, and then later on we would bring a handful of the hops out to the doorway, to the light, and we would make a comparison between the tryings out of each bale with the type sample we had that was drawn previously."

Appellant's inspectors also took larger samples from about one-tenth of the bales, which samples were selected to be representative of the crop, and which matched up with the type samples previously drawn.

The warehouse number was already on the bales when they started the inspection. While they were making the inspection, the Government representatives were also taking their samples for the leaf-and-stem analysis and marking the bales with the code number. As Mr. Noakes explained (W.R. 288):

> "It is a code number used by the Department of Agriculture to identify each lot, each lot that they sample. The grower has a code number and if he has more than one lot they are classified by letters."

Having inspected the hops, Mr. Noakes and his men then marked the respective bale number on the head of each bale, weighed the bales and prepared the weight slips. The inspecting, sampling, marking and weighing, which constitute all the acts normally incident to the inspection and acceptance of hops, were all done in the usual and customary manner.

By the custom of the trade the weighing of the bales, following such an inspection, is acceptance. Any bales which the buyer wishes to reject are set out and not marked with a number or weighed. None of Mr. Wellman's hops were so set out or rejected.[11]

Since the hops were accepted, quality is not a real issue. However, it is interesting to note that Mr. Noakes, the chief inspector for appellant, found that they were large, flaky hops, filled with lupulin, and had quite a good flavor (W.R. 314). Mr. Davis, who assisted Mr. Noakes with the inspection, found that they were large, whole-berried hops, well filled with lupulin, and had a good flavor (W.R. 360). Even Mr. Ray, after seeing the samples, wrote appellant's Eastern office (W. Ex. 3-k), "Had these hops been cleanly picked, they would have made quite a decent sample." When the official analysis of the hops was received it showed 11% leaf-and-stem content, which was as good as or better than many lots of clusters taken

11 The evidence supporting the statements in the last several paragraphs is cited in detail in the Appendix, post, pp. viii-xvii.

in by appellant that year, and which was compensated for by the reduction in price on the sliding scale basis. (Appendix, post, pp. xxvi-xxx.)

The hops having been received and weighed in, Mr. Wellman went on his hunting trip with a free mind. The price was not paid at that time because the amount depended upon the leaf-and-stem content and the sliding-scale feature of the market price. Under these conditions payment for the hops became due as soon as the official analysis was received. As Mr. Ray testified on direct examination (W.R. 417):

> "Q. As a general practice, how soon after A. J. Ray & Son accept hops for the account of John I. Haas, Inc., does A. J. Ray & Son pay the grower for those hops?
>
> A. After the inspection certificate has been issued and we know what the analysis is, immediately a check is given to the grower, but in case the inspection certificate has not been received we are forced to wait until it has been issued so that we know how to pay."

Upon returning from hunting Mr. Wellman went to see Mr. Noakes who told him that closing the deal was being held up because the official analysis was not yet back, but that he expected it "most any time" (W.R. 400).

On October 10th appellant's Eastern office decided, without seeing the tenth-bale samples, that it would take the fuggles but not the clusters, and instructed its local agent to pay only such balance

as might be due after deducting all advances from the price for the fuggles (W. Exs. 3-s, 3-r). Subsequently appellant's Eastern office instructed its Oregon agent that, after the fuggles had been taken and all the advances deducted, the clusters should be rejected, assigning as a reason that "the restrictions on brewers in the use of grain has changed the picture considerably" (W. Ex. 3-u).

On October 28th Mr. Noakes told Mr. Wellman that the returns had come through on the fuggles, that he could pay for them but that he was required to deduct all the advances from the price for the fuggles (W.R. 84-85, 323, 401-402). Mr. Wellman hesitated to settle for the fuggles alone, but Mr. Noakes told him they had not yet heard on the clusters and that settling for the fuggles would not affect the later settlement for the clusters (W.R. 84-85, 401).

There was no later settlement on the clusters. Appellant's representatives negotiated with Mr. Wellman about the matter over a period of several months. In the meantime Mr. Wellman had had a similar problem with S. S. Steiner, Inc., on the other one-half of the clusters. In the spring of 1948 the Steiner company settled with Mr. Wellman, and he had an opportunity to resell all the clusters for what was then the going price. Appellant consented to the resale and the proceeds thereof are credited against the contract price of the clusters in arriving at the judgment here. (W.R. 85-92, 371, 385, 388, and Appendix, post, pp. xxix-xli.)

SUMMARY OF ARGUMENT

Our argument is directed to the three "ultimate" issues proposed by appellant (Br. 4):

I. *Issue on acceptance.* The trial Court found that appellant in fact accepted the hops. The finding is fully supported by the evidence. (This is in answer to appellant's point IV, Br. pp. 33, 47-62.)

II. *Issue on quality of the hops.* The trial Court found that the hops upon tender and delivery substantially conformed to the quality provisions of the contract. The finding is clearly supported by the evidence. (This is in answer to appellant's points I, II, III, V, Br. pp. 32-33, 34-46, 62-66.)

III. *Issue on form of action.* The hops having been accepted, the grower can maintain this action to recover the balance of the sales price. (This is in answer to appellant's points VI, VII, VIII, IX, Br. pp. 33-34, 66-74.)

I. ISSUE ON ACCEPTANCE

The trial Court found that appellant in fact accepted the hops. The finding is fully supported by the evidence.

The trial Court's findings of fact[12] include the following:

> "At that time [in the warehouse on September 25, 1947] the bales of hops which constituted said one-half of said crop of 1947 late cluster hops were received, inspected, sampled, marked and weighed by defendant [appellant], and

12 "If the facts leave it in doubt whether there has been acceptance the determination of the question is for the jury." Williston on Sales, Rev. Ed., §483.

were identified, appropriated to the contract and set aside. * * *

"At the time said contract was entered into, and at the time of the delivery and weighing in of the late cluster hops as aforesaid, it was an established usage and custom in the hop trade in Oregon, which was known to the parties hereto, that such weighing in of hops by the buyer following such an inspection constituted an acceptance of such hops. The parties did not agree upon any change in or deviation from, and plaintiff did not waive, said established custom and usage. Defendant in fact accepted said one-half of the 1947 crop of late cluster hops produced by plaintiff [appellee] as aforesaid, * * *"

The findings are supported by the evidence (Appendix, post, pp. viii-xxiv).

Appellant has two principal objections to these findings: (a) The claim that the evidence is not sufficient in quantity to establish the custom; and, (b) the argument that the inspection, sampling, marking and weighing of the hops at the warehouse did not constitute an "inspection".

A. Custom that weighing hops is acceptance.

(1) Quantum of evidence.

Counsel assert (Applt's Br. 48): "Only two witnesses testified during the trial of this and the two preceding cases that a custom or usage existed by which the weighing of hops following an inspection of them constituted an acceptance of such

hops: Mr. Kever and Mr. Glatt." It is then argued for appellant that the two witnesses did not use precisely the same wording in their testimony, and that therefore the statute requiring proof of usage by two witnesses was not satisfied.

In making this contention counsel have overlooked much of the record, including Mr. Geschwill's testimony which counsel quoted in their statement of points to be relied upon (W.R. 40). Mr. Geschwill testified (G.R. 116) that as long as he had raised hops the custom was that inspecting and weighing-in was acceptance. "The ones they rejected, they naturally wouldn't weigh them at all."

Mr. Wellman testified (W.R. 83) that that was the only way he had ever sold hops.

Having been in the hop business since 1916 (W.R. 442), appellant would be presumed to have known of the custom. *Hurst v. Lake & Co.*, 146 Or. 500, 502, 31 P. 2d 168. Moreover, there is positive evidence that appellant was fully aware of the custom, and subsequently sought to avoid it with other growers. Thus, on September 25, 1947, appellant, wishing to make a change in the practice, telegraphed its Oregon agent (W. Ex. 5):

> "Suggest all contract [growers] * * * be notifield by letter that inspection sampling and weighing does not constitute acceptance and that decision this question by home office will be communicated to grower later so no misunderstanding such inspection etc. can arise."

Upon receipt of that telegram Mr. Ray said (W.R. 230-231):

> "* * * I drafted a letter [W. Ex. 12], which was typed and sent to all contract growers, and I told them not to send it to Mr. Wellman because they were inspecting and weighing and sampling Mr. Wellman's hops that very day."

Mr. Noakes admitted of the new method, "It is probably a procedure that deviates from the usual custom" (W.R. 327). Mr. Haas testified (W.R. 469):

> "* * * we have changed that and we are currently, as for example this past season in Yakima where they had as you know wind damage there to hops—we stamp on all of our weight sheets that it does not constitute acceptance of the hops; * * *"

(Compare also appellee Geschwill's brief, pp. 14-15).

It is submitted that there is more than sufficient quantum of proof in the foregoing testimony of Mr. Geschwill and Mr. Wellman, and the admissions of appellant's witnesses, together with the testimony of Mr. Keber and Mr. Glatt to which counsel refer (Applt's Br. 48-49; W.R. 126, 134, 138, 422-423; and Appendix, post, pp. xv-xvii).

The custom is in harmony with the legal obligation of the buyer to attend, at the time and place the goods are tendered for delivery, in order to inspect the same and then either accept them or specify any objection he may have to them. Compare *Catlin v. Jones,* 48 Or. 158, 85 Pac. 515; *Seiden-*

berg v. Taufest, 155 Or. 420, 64 P. 2d 534; §§71-141[13] and 72-103, O.C.L.A.[14]

The buyer is deemed to have accepted the goods either where he intimates to the seller that he has done so, or where he exercises dominion over them. §71-148, O.C.L.A.;[15] Williston on Sales, Rev. Ed. §483. Here appellant at the time of tender did not reject any bale, marked all of them with bale numbers, and did all the acts which are customarily incident to and constitute inspection and acceptance.

(2) Duration of custom.

Counsel assert (Applt's Br. 51) "there certainly is no evidence that such custom or usage [of weighing being acceptance] is ancient or that, in fact, it existed when this contract was entered into on February 7, 1944, approximately five years before the trial of this case."

Mr. Keber had been familiar with the hop business for "at least thirty-five years" (W.R. 130) and he had "always understood" that to be the custom

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13 §71-141, O.C.L.A.: "It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale."

14 §72-103, O.C.L.A.: "The person to whom a tender is made shall at the time specify any objection he may have to the * * * property, or he must be deemed to have waived it; * * *"

"Regardless of what may be the rule in other jurisdictions, it was incumbent upon the plaintiff, under the statute of this state, to specify its objections to the hops at the time delivery was tendered." *Seidenberg v. Taufest, supra,* 155 Or. at 424.

15 "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

(W.R. 134). Mr. Wellman had been in the hop business "since 1930" (W.R. 58) and he said "that is the only way I have ever sold hops" (W.R. 83). Mr. Noakes had been with the Ray company in the hop business "for 36 years" (W.R. 276), and he admitted that the new method proposed by appellant "is probably a procedure that deviates from the usual custom" (W.R. 327). Mr. Glatt testified to the general custom (W.R. 126) from his experience in the hop business of "about twenty years" (W.R. 120). Mr. Geschwill "had experience about 10 or 12 years in hops" (G.R. 70), and he had been growing his own since 1943 (G.R. 71). He said such was the custom "as long as I raised hops" (G.R. 116).

(3) Uniformity of custom.

Counsel say (Applt's Br. 48-49) that there is a variance between the testimony on the following ground:

> Mr. Keber said that where weighing the hops preceded the receipt of the official leaf-and-stem analysis such weighing was acceptance—"That is done right along" (W.R. 143).
>
> Mr. Glatt said that weighing is acceptance where the parties have agreed on the price and where on inspection the tryings and samples meet the type samples (W.R. 126).

It is obvious from the record that all the witnesses who testified on the subject, including both the witnesses whose testimony counsel refer to and also the others, spoke with reference to a situation

where there was an agreement to sell at a fixed price or the market price, and where the usual inspection preceded the weighing. The witnesses merely used different words in uniformly testifying to the same fact; the claimed variance does not exist.

The leaf-and-stem content of hops is apparent both from the type samples and from the tryings and the tenth-bale samples taken at the time of the inspection in the warehouse. The precise percentage of leaf-and-stem content subsequently shown by the official analysis is used in computing the sliding-scale premium or discount on the market price. Appellant's argument seems to be that the market price is not sufficiently certain to permit acceptance until the premium or discount is finally computed.

It is undisputed on the record that the acceptance of hops is not delayed pending the receipt of the official analysis, but that payment for the hops after they have been accepted is held up until the official certificate is received and the sliding-scale premium or discount is known.[16] Such is the testimony of Mr. Ray (W.R. 417), Mr. Keber (W.R. 142-143), Mr. Wellman (W.R. 411-412), and Mr. Smith (W.R. 429-430).

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16 The practice of the parties and of the trade in this respect is well-founded in law.

"* * * in an executory contract to sell, or in a sale, the parties may provide for some means of determining the price later by outside circumstances." Williston on Sales, Rev. Ed., §167.

Formerly there was a presumption, applied in the absence of facts showing a contrary intent, that parties did not intend the property in the goods to pass where weighing or measuring remained to be done by the *seller* to ascertain the price, but there is no such pre-

B. Inspection of the hops at the warehouse.

Appellant contends that the custom of weighing being acceptance is not applicable here because there was no inspection at the warehouse. In support of this it is claimed (1) that appellant's agent had no authority to inspect and accept (Br. 52-53, 57), and (2) that the customary inspection at the warehouse did not give appellant a reasonable opportunity to examine the hops (Br. 54-62).

(1) Authority of agent.

Appellant contends (Br. 52) that there was no inspection at the warehouse because "the employees of the defendant's [appellant's] Oregon representative, who sampled the hops at that time, had no authority to accept or reject them."

It is easy now for appellant to seek to disown its Oregon agent, the Ray company, and Mr. Noakes, the vice-president and Salem manager who exercised the authority of the corporate agent. It would have been equally easy for appellant to insist upon the authority of its Oregon agent had the market for hops gone up.

The record is clear that the agent had actual authority (ante, pp. 6-7). Appellant claims it sought to change and restrict its agent's authority by adopting a new procedure. The record shows

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sumption now under the Uniform Sales Act. Williston on Sales, Rev. Ed., §§266-269; *Cownie v. Local Board of Review*, 235 Iowa 318, 16 N.W. 2d 592, 597. Even if there were such a presumption it would not be applicable here for each of several reasons: Nothing remained to be done by the seller; the computation related merely to premium or discount on an established market price; the hops were in fact accepted.

not only that Mr. Wellman knew nothing of the change, but even that the change was sought to be made after his hops were being taken in.

The letter of September 16th (W. Ex. 18) from appellant's Eastern office to its Oregon agent says nothing about weighing-in but speaks of sending a line of samples to the Eastern office to show customers. This could have been accomplished by sending more of the preliminary "type" or "inspection" samples (W.R. 469-470).[17]

On September 24th the Eastern office telegraphed the Oregon agent (W. Ex. 3-g): "On questionable lots require tenth bale samples and time to submit samples our customers." On that day appellant took in a crop of clusters which showed mildew and had 14% leaf-and-stem content (W.R. 329-330; W. Ex. 17, pp. 8-9). Apparently that lot was not considered questionable.

Appellant claims that Mr. Wellman's crop on the following day, September 25th, was the first handled under the new method (W.R. 330). On that day appellant *suggested* (W. Ex. 5) to its Oregon agent that a letter be sent each grower saying that inspection and weighing would not be considered acceptance. No such letter was sent Mr. Wellman "because they were inspecting and weighing and sampling Mr. Wellman's hops that very day" (W.R. 230-231).

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17 The hop purchase contract here was mutually binding, and not a mere option on the part of appellant to accept and pay for the hops only in the event that it had first resold them. There was nothing to put the grower on notice that appellant regarded its contract as such an option.

In any event, however, the agent clearly had apparent authority. The grower is not bound by the appellant's secret instructions to, or undisclosed changes in the authority of, the Oregon agent.

> "Proof of the authority of the agent may be made by the course of dealing between the parties. It is not necessary for the latter [i.e., the grower here] to prove that the principal conferred, either in writing or orally, specific authority, if the conduct of the agent is within the scope of his authority as disclosed by the conduct of the parties. One dealing with a corporation must deal with its agents. He has a right to rely upon the apparent scope of the agent's power." *Carstens Packing Co. v. Gross,* 131 Or. 580, 584, 283 Pac. 20.
>
> "The authority of an agent to bind his principal in contracts made with a third party is measured, not only by the agent's express delegation of power, but also by that which he is held out by the principal as possessing, provided, however, the third party had reason to believe and did believe the agent was acting within and not exceeding his authority, and such party would sustain a loss if the contract was not regarded as that of the principal." *Nicholas v. Title & Trust Co.,* 79 Or. 226, 238, 154 Pac. 391.

In past years Mr. Noakes had bought and paid for spot purchases of Mr. Wellman's hops for appellant. Mr. Noakes had negotiated this series of contracts for appellant with Mr. Wellman, and had prepared the contracts himself. All of Mr. Well-

man's dealings under the series of contracts were with Mr. Noakes, or his assistants, representing appellant. Mr. Noakes had authority to inspect hops tendered on appellant's contracts and to issue checks to the growers in payment for such hops. In prior years under this series of contracts Mr. Noakes had inspected and weighed in Mr. Wellman's hops and thereby accepted them for appellant. The evidence indicates that Mr. Noakes had actual authority, but in any event he had apparent authority again in 1947 to weigh in and thereby accept Mr. Wellman's crop for appellant; and he did so. (W.R. 59, 61-62, 121, 164-165, 248, 276-277, 299-300, 312-313, 417.)

(2) Appellant's proposed method of inspection.

Appellant contends (Br. 54-62) that the inspecting, sampling, marking and weighing of the hops at the warehouse was only a "sampling", and that inspection of the tenth-bale samples at the Eastern office would have been the only reasonable method and place for inspection of the crop.

The argument is without basis in the record.

(a) Appellant did not in fact follow its suggested procedure. Without even seeing the tenth-bale samples, its Eastern office decided it wanted the fuggles and probably did not want the clusters. (Appendix, post, pp. xxii-xxiv.) The inference is permissible that in fact appellant suggested the new procedure in order to have time to see the effect on its resale market of the grain restrictions on

brewers and of the unexpected Oregon hop production. (Compare appellee Geschwill's brief, p. 11, n. 11, and Appendix thereto, pp. xiii-xiv.)

(b) The evidence indicates that appellant did not seek to put its new method into effect until after Mr. Wellman's hops had been accepted (ante, p. 25).

(c) The suggested procedure would have been a deviation from the contract. The inspection at the warehouse was such an inspection as was customarily incident to acceptance. (Appendix, post, pp. xi-xvii.) The parties contracted in contemplation of such an inspection and acceptance.[18]

(d) According to appellant's inspector the tenth-bale samples conformed to the type samples which appellant had had for some time (W.R. 286-287, 308-311). If the examination were to be limited to a few samples, appellant could ascertain as much from a few type samples as from a few tenth-bale samples.

(e) Contrary to appellant's argument (Br. 60) the taking of the tenth-bale samples was not an implied request that further inspection of those samples be permitted by the Eastern office. Tenth-bale samples are always taken during the regular inspection at the warehouse as "a part of the pro-

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18 The proposed procedure would in effect change the contract from one for sale of a specific hop crop to one for some sort of sale by sample. Ordinarily in a sale by sample the sample is approved by the buyer and then the hops are examined to see if they meet it. By appellant's method the sample would be selected as representative and then the buyer would decide whether to approve the sample.

cess of determining the quality and condition of the hops" (Mr. Ray, W.R. 436). The tryings may be broken up and the larger samples show the wholeness and flaky condition of the hops. After the weighing-in, the tenth bale samples, or splits of them, always go to the buyer's office for such use as he may have for them as representing the hops he has purchased. Before the new procedure was attempted in 1947 it had never been the practice to condition acceptance upon approval of such samples. (W.R. 418-438.)

(f) The place of inspection is the place of delivery, which the contract here specified to be Mt. Angel, Oregon. Williston on Sales, Rev. Ed., §480. The buyer had a reasonable opportunity to, and did, inspect the hops in warehouse at Mt. Angel where they were tendered for delivery, and the trial Court found that in fact appellant accepted the hops.

It is submitted that appellant's argument that the only reasonable place and method of inspection was at its Eastern office by an examination of a few samples is not warranted by the contract, is not supported by the evidence, is founded solely upon the buyer's convenience, and disregards the buyer's reciprocal obligations to the grower.

II. ISSUE ON QUALITY OF THE HOPS

The trial Court found that the hops upon tender and delivery substantially conformed to the quality provisions of the contract. The finding is clearly supported by the evidence.

Since the hops were accepted, we do not regard quality as an issue. However, appellant argues (Br. 34-41, 46) that the hops were not of "prime quality" and (Br. 62-66) that it rejected them. Appellant also argues under this heading (Br. 41-45) that the market price was not computed on the sliding scale basis for leaf-and-stem content.

A. The quality of the hops.

The trial Court's findings are set out in the Appendix, post, p. xxxiv, and see also pp. v-viii, xxxi-xxxiv, xxxv-xxxix.

Mr. Keber (W.R. 138), Mr. Schlottman (W.R. 159), and Mr. Willig (W.R. 152-153), who were all experienced in the hop business, testified that these hops were of the same character and quality of hops which were accepted in the trade under this type of contract.

Appellant's witnesses criticized the hops because they showed mildew and leaf-and-stem content (Applt's Br. 14-16). Those witnesses included:

> Mr. Haas, vice-president of appellant, who did not know that appellant's contracts with growers call for only "prime" hops (W.R. 457-459), and who testified that appellant sold its own hops to breweries when the hops showed

mildew and 10% leaf-and-stem content (W.R. 455; W. Ex. 17).

Mr. Ray, who thought that hops to be prime could not show any mildew nor more than 6% leaf-and-stem content (W.R. 241-242), but who that year sold to appellant 588 bales of his own cluster hops showing mildew and 11% leaf-and-stem content, and 114 bales of his own cluster hops showing mildew and 12% leaf-and-stem content, which hops appellant resold to breweries (W.R. 456-457; W. Ex. 17, pp. 6-7).

Mr. Eismann, Oregon manager for another dealer-litigant (W.R. 384-385).

Mr. Franklin, who "didn't see a Willamette Valley hop in 1947" (G.R. 495).

The inspectors, Mr. Noakes and Mr. Davis, who actually saw the hops in the field and in the bales, also spoke of the mildew and the leaf-and-stem content, but in addition they testified that the hops were large and flaky, were well-filled with lupulin, and had a good flavor (W.R. 314, 360). Mr. Ray when he saw the fresh samples in 1947 was of the same opinion (W. Ex. 3-k).

Appellant's arguments against the Court's findings of fact on this point follow closely the arguments of the appellant in the Geschwill case, and accordingly we incorporate here by this reference the material appearing in appellee Geschwill's brief, pp. 19-45.

B. The hops were not rejected.

Appellant claims (Br. 62-66) that it rejected the hops and specified its grounds therefor, not when tender was made at the warehouse, but a month later in the conversation between Mr. Noakes and Mr. Wellman on October 28, 1947.

Since the hops had previously been accepted, the subsequent purported rejection would have been ineffective.

Under the Oregon statute it was incumbent upon the buyer to specify its objections, if any, to the hops at the time delivery was tendered, or any such objections would be deemed to have been waived. (See ante, p. 21, note 14.)

As to the purported rejection on October 28th, the evidence can be summarized as follows:[19]

> Mr. Wellman (W.R. 85): "There wasn't a word of rejection mentioned."
>
> Mr. Noakes (W.R. 320): "I said we did not accept them" (meaning that the returns had not yet come in from the Eastern office?).
>
> Mr. Davis (W.R. 355): "Mr. Noakes turned to Mr. Wellman and he said, 'We can't take those late hops, Otto' " (meaning not yet?).

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19 In connection with the purported rejection, counsel say (Applt's Br. 63), "the defendant declined to receive such hops or a warehouse receipt representing them." The evidence is that the warehouse receipt is only turned over when payment is made, that the warehouse receipt for the clusters was not actually issued until they were resold, and that neither the warehouse receipt nor the load checks were either proffered to or requested by appellant (W.R. 104-106, 210-211, 315).

"He [the hop grower] was not obliged to turn over his warehouse receipts before receiving payment." *Seidenberg v. Tautfest, supra,* 155 Or. at 426.

Mr. Ray continued thereafter to talk of appellant's "moral obligation" to Mr. Wellman (Appendix, post, pp. xxxix-xli; W.R. 210).

As to the failure to specify any objections, the evidence may be summarized as follows:

Mr. Davis (W.R. 357): "I don't recall that he [Mr. Noakes] said we cannot accept them for any certain reason, no. * * * I don't recall that he came right out and gave a reason for not taking them."

Mr. Noakes (W.R. 321): "I just said they were not acceptable. * * * I was assuming that he [Mr. Wellman] knew the condition of the hops."

Mr. Wellman (W.R. 401): "Before I took the check [for the fuggle price less all advances], I asked Mr. Noakes, I said, 'Will this have any bearing on the settlement of the lates, paying for the lates?' And Mr. Noakes said, 'Not whatsoever.' "

Appellant's instructions were to take the fuggles, pay the small balance after deducting all advances, and then after that was done to reject the clusters (W. Exs. 3-r, 3-s, 3-u).

The Court's finding is that appellant did not then specify any particular objection it may have had to the hops (Appendix, post, xxxi).

C. Computation of market price.

The trial Court found (Appendix, post, pp. xxvi, xxx):

"According to the general custom and usage of the trade that year, which was known to the parties, such leaf and stem content was compen-

sated for, and the grower market price was computed, by deducting one cent per pound for each one per cent that the leaf and stem content exceeded eight per cent. * * *

"The grower market price for said hops under said contract was 85 cents per pound net weight, less 3 cents per pound deduction for leaf and stem content as aforesaid. * * *"

(1) Appellant's objection to validity of sliding scale feature of 1947 market price.

The custom referred to in the Court's finding relates to the 1947 market price, and not to a provision in the 1944 contract. Appellant argues (Br. 42-44) that the market price in 1947 must be determined upon factors known to and contemplated by the parties in 1944 when the contract was executed.[20] Upon such an argument most market price contracts for extended terms would be invalidated.

The contract (W. Ex. 1-A) provides in part:

"It is agreed and understood that the price to be paid by the Buyer * * * shall be the Federal Grower Ceiling Price * * *

"In the event that no Federal price regulation is established and in effect covering 1947 crop Oregon hops, the price to be paid by the Buyer to the Seller for the hops covered by this contract shall be either Forty five cents (45c) per pound or the Grower market price whichever is the higher * * *"

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20 The sliding scale first came into use in computing the ceiling price on the 1944 crop, and was applied by the parties under this series of contracts. (W.R. 63; Appendix, post, pp. xxvii-xxviii.)

Appellant does not challenge the findings that there was no Federal price regulation in effect covering the 1947 crop of Oregon hops, and that "the price to be paid by the defendant buyer for said late cluster hops under said contract was the grower market price for such Oregon hops * * *" (Appendix, post, p. xxiv).

The parties obviously contemplated that the ceiling prices in effect in 1944 might not apply in 1947, and that in such event the grower was to have the benefit of the then market price, however that market price might be arrived at or computed.

> "To constitute a sale, the price need not be definitely fixed at the time the sale is effected, if the agreement contains express or implied provisions by which it may be rendered certain: [citation]. There could be no uncertainty as to defendant's market price * * *. The contract expressly provides that the price to plaintiff should be four cents per gallon less than that." *Moore v. Shell Oil Co.,* 139 Or. 72, 79-80, 6 P. 2d 216.
>
> "* * * in an executory contract to sell, or in a sale, the parties may provide for some means of determining the price later by outside circumstances." Williston on Sales, Rev. Ed., §167.
>
> " 'Current market price,' in a case of this kind, means that the contract price shall run or flow with the market, following its fluctuations." *Ford v. Norton,* 32 N.M. 518, 260 Pac. 411, 55 A.L.R. 261, 267.

(2) Appellant's objection to proof of sliding scale feature of market price.

Counsel say (Applt's Br. 42): "Only one witness, Mr. Harold W. Ray, gave any testimony with respect to a custom of this sort * * * This is insufficient proof * * *"

Counsel have overlooked the testimony of appellant's other witnesses. For example, appellant's witness Mr. Eismann, the manager for the large hop concern of S. S. Steiner, Inc., said (W.R. 387):

> "Q. Did the Steiner corporation recognize this sliding scale in 1947?
>
> A. We did, uniformly throughout."

Again, appellant's witness Mr. Noakes testified that the sliding scale was applied in determining the market price under such contracts as this "because that was the procedure or the custom in the market in that year" (W.R. 317).

Appellant itself instructed its agent to fix the price for clusters at 85 cents on the sliding scale, and to apply the penalties on picking (W. Ex. 3-f; W.R. 250-251).

Mr. Wellman considered that the price to be paid for his 1947 clusters was "85 cents less a cent for each pound over eight per cent pick, and a premium for under" (W.R. 113).

The testimony supporting the finding is set out in some detail in the Appendix, post, pp. xxvi-xxix.

In addition, there is evidence of specific transactions. The picking discount was applied in Mr. Glatt's case (W.R. 128, 129), and in the other particular instances mentioned by Mr. Ray (W.R. 235-240).

Appellant took in a large quantity of cluster hops in 1947 which ran from 10% through 14% leaf-and-stem content, and appellant's practice in applying the standard market-price deduction for leaf-and-stem content seems only reasonable (Appendix, post, v, xix, xxxiii).

III. ISSUE ON FORM OF ACTION

The hops having been accepted, the grower can maintain this action to recover the balance of the sales price.

Since the hops were accepted, there is no real issue on this point. Appellant has, however, repeated the same argument used by the appellant in the Geschwill case, and accordingly we incorporate here by this reference the material in appellee Geschwill's brief, pp. 46-75.

(1) Appellant's objection to its agent's oral confirmation of the market price selected by the grower.

Appellant contends (Br. 3-4, 24, 73) that the action of its agent in confirming orally the price selected by the grower, rather than in writing, deprives the grower of that market price and relegates him to the much lower floor price of 45 cents a pound. It is not disputed that the market price selected was the actual market price, and that appellant did not

at any time before trial object to the telephonic confirmation. Appellant contends (Br. 3-4), however, that it had issued instructions to its agent to confirm in writing and if its agent did not comply therewith the grower must suffer.

The contractual provision and Mr. Noakes' testimony as to his oral confirmation are quoted in the Appendix, post, xxv-xxvi.

(a) The written confirmation contemplated by the contract is only evidence of the price selection, and the fact that such evidence was not reduced to writing does not defeat the selection which in fact was made.

> " 'To confirm' as here used is defined by Webster's Dictionary as follows: 'To give new assurance of the truth of, to render certain, to verify, to corroborate'—and to confirm the purchase must of necessity mean that the purchase had theretofore been made, and the letter was simply a written memorandum thereof confirming the same, * * *" *Horner v. Daily,* 77 Ind. App. 378, 133 N.E. 585, 586.

(b) Mr. Noakes had at least apparent authority, and probably actual authority, to confirm the selection orally. Mr. Ray testified that under this series of contracts there had never been a written confirmation of the selected price, he believed that appellant had told him it wanted such confirmations in writing, but it had never refused to recognize a telephonic confirmation. (W.R. 228-229; and see W.R. 303-304.)

CONCLUSION

We respectfully submit that the trial Court's findings are clearly supported by the facts, that the Court's conclusions are sound in law, and that the findings and conclusions support the judgment.

Respectfully submitted,

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August 19, 1950.

APPENDIX A

Explanatory Note: This appendix consists of the trial Court's findings of fact (W.R. 9-16), references to appellant's specifications of asserted error (Br. 20-30), and citations to the supporting evidence. The portions of the findings which are questioned by appellant are printed in italics, and the number following each italicized portion corresponds to the number of appellant's asserted error relating thereto.

Finding "1. At the time of the commencement of this action and at all times herein mentioned plaintiff was and is a citizen of the State of Oregon and defendant was and is a corporation incorporated and existing under the laws of, and a citizen of, the State of Delaware."

Asserted error: None.

Finding "2. The amount in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000; and this Court has jurisdiction of the subject matter, the parties and the cause of action."

Asserted error: None.

Finding "3. On or about February 7, 1944, plaintiff, as seller, and defendant, as buyer, entered into the 1947 'hop contract' received in evidence herein, which contract was one of a series of similar contracts entered into between the parties at the same time relating to hop crops for several successive years. *By said contract it was agreed that plaintiff would sell and defendant would buy one-half of the*

salable crop of fuggle and late cluster hops grown by plaintiff on a certain farm in Clackamas County, Oregon, in 1947.[1] There is no controversy here concerning the fuggle hops which were in 1947 grown by plaintiff and accepted by defendant. *The one-half of the 1947 crop of late cluster hops involved here was duly grown and raised by plaintiff on said farm."*[2]

Asserted error No. 1 (Applt's Br. 20) to finding that the parties bargained for one-half the salable crop of hops grown in 1947 by appellee on the designated premises. The finding uses the language of the contract (W. Ex. 1-A):

> "That said Seller * * * does hereby agree to sell and deliver to the Buyer *one-half salable crop estimated at 100,000* pounds of *fuggle and late cluster* hops to be raised and grown by the Seller in the year 1947 on the following described real estate situate in the County of *Clackamas,* State of *Oregon,* to-wit: *The Butte Creek Orchards farm situated about one mile north of Monitor, on which there is now growing and to be grown in 1947, forty acres of fuggle hops and one hundred, thirty acres of late cluster hops."* (The italicized matter was typewritten on the buyer's printed form contract.)

The rider attached to the contract specifies the price "to be paid by the Buyer to the Seller for the hops covered by this contract".

In objecting to this finding appellant contends (Br. 20) that it was not required to accept these hops because of their quality. The Court found that appellant did accept these hops (post, p. xiv), and

that they substantially conformed to the quality provisions of the contract (post, p. xxxiv).

Asserted error No. 2 (Applt's Br. 20-21) to finding that the crop was duly grown and raised by appellee on said farm. Appellant's witness Mr. Noakes testified concerning appellee's said hop yard in 1947 (W.R. 300):

> "Q. How would you describe the care and cultivation of the yard?
>
> A. Very good."

Appellant's witness Mr. Davis testified (W.R. 358) that the yard "was in excellent condition for cultivating and stringing".

Mr. Keber testified (W.R. 131) that Mr. Wellman's yard that year was one "of the outstanding yards in the country". Mr. Keber's observation was based on an extensive survey of the hop yards in the Willamette Valley (W.R. 147).

Appellant's objection to this finding (Br. 21) is only the contention that the "undisputed" evidence shows the hops when tendered did not meet the contract. The evidence supporting the Court's findings that appellant accepted the hops and that they substantially conformed to the contract is summarized post, pp. xi-xiv, xv-xxiv; v-viii, xxxi-xxxiv, xxxv-xxxix.

This asserted error No. 2 is mentioned for the first time in appellant's brief, and is not included among the points designated by appellant upon which it would rely (W.R. 30-42).

Finding "4. By said contract defendant buyer agreed to advance to plaintiff seller, as part payment under the contract, certain sums on certain dates,

and the contract provided that defendant should have a prior lien upon said hop crop for such advances. Pursuant to said contract, defendant caused plaintiff to execute and deliver to defendant a separate chattel mortgage upon said 1947 hop crop, and defendant duly filed said chattel mortgage in the records of Clackamas County, Oregon. Defendant did not at any time release or discharge said mortgage of record."

Asserted error: None.

Finding "5. Said contract provided in substance that if said growing crop at or before the time of picking was not in condition to produce the quality of hops called for by the contract, then the defendant buyer would have been released from its obligation to make any further advance under the contract. In 1947 there was, and defendant knew there was, widespread mildew in hop yards in the Willamette Valley in Oregon. *Before and at the time of picking defendant knew* that there was mildew in plaintiff's said late clusters hops and *that said hops when picked and baled would in normal course show such mildew.*[3] Defendant, having such knowledge, elected to make plaintiff a further advance payment to enable plaintiff to harvest said late cluster hops. *Such mildew in said late cluster hops did not thereafter become more pronounced or prevalent.*"[4]

Asserted error No. 3 (Applt's Br. 21) to finding that appellant knew the cluster hops would show such mildew when picked and baled. Mr. Noakes was the manager of the Salem office for appellant's

local representative (W.R. 164, 220, 276, 299). He observed before picking that there was some mildew throughout Mr. Wellman's yard (W.R. 279, 301). Mr. Noakes testified (W.R. 318):

> "Q. Would it be proper to say that the harvested hops showed the same mildew that the hops in the field had been showing for the past two months?
>
> A. If it was in the field, it would show in the samples unless—if it was general in the yard, it would show in the sample, yes."

Mr. Haas, appellant's vice-president, explained that the clusters from appellant's own Mitoma yard were picked with great care, "absolutely hand-screened," but he admitted that they showed 10% leaf-and-stem content and that it was "only natural" some mildew would show in the baled hops (W.R. 465). Mr. Haas testified (W.R. 455) that "certainly" appellant disposed of its own Mitoma clusters; the various breweries to which they were sold are shown in W. Ex. 17 at the bottom of the second sheet.

Appellant's objection to this finding seems to be based on an assumption that Mr. Wellman should have employed not only the care which appellant used in picking its own hops, but should even have picked "selectively". The normal manner of picking hops by hand is for the picker in one stroke to strip a quantity of hops off the arm of the vine into the basket (W.R. 132). "Selective" picking would mean picking each hop singly and turning it around to see if there was any mildew on it (W.R. 74).

Appellant's witness Mr. Ray testified (W.R. 227):

> "Q. Would you say that such selective picking was feasible or practicable in Oregon in 1947?

> A. No, I don't think it was practical. I do think it was practical and feasible to leave certain burrs on the vine where the infection might be worse, leave them unpicked, but I think what you mean, when we speak of selectively picking, it means picking the hops, you might say, one by one selectively off the vines. I don't consider that was practical."

Mr. Wellman agreed that such burr-by-burr picking "could not be done" (W.R. 74, 100, 102).

In view of the conditions that year Mr. Wellman's picking was done in a careful manner (W.R. 101, 118, 131-132), and in avoiding as many of the mildewed hops as possible a large quantity was left on the vines (W.R. 403-404). Mr. Keber (W.R. 132) and Mr. Glatt (W.R. 124) testified that it was not possible to harvest a crop showing mildew without having some of the mildew show in the baled hops.

See also appellee Smith's brief, pp. 16-18, and the Appendix thereto, pp. ii-iv, vii-viii, as well as the Appendix to appellee Geschwill's brief, pp. iii-v.

Asserted error No. 4 (Applt's Br. 21) to finding that the mildew did not become more pronounced or prevalent. The evidence is that the condition of the yard improved with respect to the mildew. Appellant knew of the widespread mildew that year brought on by the rainy weather (W.R. 340), and early in August appellant's local representative advised it (W. Ex. 3-b):

> "In looking over Wellman's yard, we are not hopeful of any cluster delivery; at least, not much of a one. It remains to be seen how well the hops hang on the vines now that we are having hot weather."

After the mildew attack, however, the vines in Mr. Wellman's yard made a second growth (W.R. 102). This condition was general in such well-tended yards in the Valley, as Mr. Walker testified:

> "* * * the hops that year [1947], after the mildew attack, made what we call a second bloom and made a second set in a great many cases, and the fields, you might say, flowered a second time and made a crop in lots of cases where it looked like they were hopeless." (G.R. 247.)
>
> "We didn't have a great lot of mildew in the spring of 1947. * * * Then, in the summer, in July, we developed a very severe attack of mildew which prevailed up until in August. It looked like probably we really would not have a great many hops in the State of Oregon, but, as I said a while ago, the hops came on and made a second growth and flowered a second time, so we ended up with a pretty fair crop, some 82,000 or 83,000 bales, where earlier it looked like we might have only 40,000 or 50,000 bales.
>
> Q. Was that second blooming you refer to typical in Western Oregon, or was that merely a condition that prevailed in your own yard?
>
> A. No, I think it was pretty general over the hop territory. I think it was true particularly of fields that got proper cultivation and care." (G.R. 265-266.)

Accordingly, early in September a picking advance was made to Mr. Wellman, and appellant's local representative notified it (W. Ex. 3-d), "We find Wellman will have some clusters for delivery, hence the advance to him."

The hops in the bales showed less mildew than had the hops on the vines because the badly mildewed vines and arms were left unpicked (W.R. 101, 131-132, 403-404).

Finding "6. Defendant buyer made advance payments under the contract in a total amount which differed from that called for by the contract but which was agreed upon by the parties. Defendant reimbursed itself for all advance payments made under said contract, with respect to both the fuggle and the late cluster hops, by deducting the total of said advance payments from the amount due plaintiff for the fuggle hops purchased by defendant from plaintiff under said 1947 contract."

Asserted error: None.

Finding "7. *Plaintiff duly raised, harvested, cured and baled said crop of 1947 late cluster hops, and in accordance with said contract delivered the same in warehouse at Mt. Angel, Oregon.*[5] The time and place of such delivery was acceptable to defendant and was in accordance with the prior practice of the parties. *On September 25, 1947, at said warehouse defendant caused one-half of said 1947 crop of late cluster hops to be segregated in a manner which was acceptable to defendant and which was in conformance with the prior practice of the parties. At that time the bales of hops which constituted said one-half of said crop of 1947 late cluster hops were received, inspected, sampled, marked and weighed by defendant, and were identified, appropriated to the contract and set aside.*[6] *Plaintiff*

duly performed all of the terms and conditions of said contract on his part to be performed."[7]

Asserted error No. 5 (Applt's Br. 21-22) to finding that the grower duly raised, harvested and delivered the hops in warehouse. As to the raising and harvesting of the crop see ante, pp. iii, v-viii. As to the baling appellant's inspector Mr. Davis testified (W.R. 362):

"Q. You considered that they were well baled?

A. Oh, yes."

The contract provided (W. Ex. 1-A) for delivery "at Mt. Angel, Oregon, in warehouse or on board cars". In accordance with the practice of the parties in prior years under the same series of contracts, the hops were delivered at Schwab's warehouse, the only bonded warehouse in Mt. Angel. The time and place of such delivery was acceptable to appellant. (W.R. 71, 75, 241-242, 305-306; G.R. 100, 344.)

The assertion of error directed to the finding on delivery in warehouse is first mentioned in appellant's brief (No. 5, p. 21), and is not included in the points to be relied upon (W.R. 31, point No. 5).

Appellant's objection to this finding (Br. 22) is the contention that upon the "undisputed" evidence the hops tendered did not meet the contract. The Court found that the hops were accepted and did substantially comply with the contract, and the findings are supported by the evidence (post, pp. xi-xiv, xv-xxiv; xxxi-xxxiv, xxxv-xxxix).

Asserted error No. 6 (Applt's Br. 22) to findings about acts done at warehouse.

(a) *Division of bales.* Appellant's contract (W. Ex. 1-A) was for the purchase of "one-half salable crop" of both fuggles and clusters, and the contract

noted "an equal quantity sold to S. S. Steiner, Inc." As Mr. Eismann, Steiner's local manager, testified (W.R. 383):

> "Q. Can you explain why it happened that half of the Wellman late cluster crop was contracted to one firm and half to the other?
>
> A. We were both trying our best to buy the crop; at the time Mr. Wellman finally decided to split it."

As to the segregation of the bales between the two buyers, Mr. Noakes, who was the chief inspector there for appellant (W.R. 306), testified (W.R. 286):

> "Q. How were the bales of clusters of Mr. Wellman in the warehouse at that time divided between you and Steiner? How was the physical division made?
>
> A. When warehousemen line hops up, they handle them two bales at a time on the truck, and they would take them out of the pile and they lined up two bales for us and two bales for Mr. Steiner and continued that split until they were all lined up."

Mr. Noakes testified that the division of the hops with Steiner was acceptable and was done in a proper manner (W.R. 306). Mr. Wellman said that it was done "in the same manner that it was the year before" (W.R. 80).

The asserted error as to the finding on the segregation of bales is first mentioned on brief (p. 22, No. 6; compare pp. 9-10), and is not included among the points on which appellant relied (W.R. 31, point No. 6).

(b) Appellant received, inspected, sampled, marked and weighed the bales constituting its one-half of the crop. Mr. Noakes testified (W.R. 306):

"Q. Did you inspect, sample, mark and weigh the hops, both fuggles and clusters, in Schwab's warehouse on or about September 25th?

A. Yes."

Mr. Noakes explained his procedure as follows (W.R. 286-287):

"After the hops were lined up, we would go through them with triers and draw a sample handful out of each and every bale, and place that handful of hops on the head of the bale, and then later on we would bring a handful of the hops out to the doorway, to the light, and we would make a comparison between the tryings out of each bale with the type sample we had that was drawn previously.

"If there is no appreciable difference in the hops, we would take the samples in order. If there should be a difference in them, then we would segregate them and put the different qualities on one or the other—either the front end or the last end of the row. Later we would number those bales and then weigh them."

Mr. Wellman testified (W.R. 80-81):

"Q. After dividing the bales to one platform and the other, what did they do, as far as the representatives of John I. Haas were concerned?

A. Inspected and took tenth-bale samples.

Q. Did they take tryings out of each bale?

A. Yes, they did that every year.

Q. Did they put numbers on the bales?

A. Yes, they numbered them from one on up. * * *

Q. Were the hops weighed in at that time?

A. Yes. * * *

Q. Were they handled in the usual manner?

A. Exactly like they had the three previous years."

The finding is further supported by W.R. 80-82, 286-289, 306-311; W. Exs. 1 (weight slips), 3-j, 3-k.

In accordance with the custom (W.R. 111, 141, 359) the buyer numbered the bales on the head but at that time did not brand them. As Mr. Noakes testified (W.R. 308):

"Q. In these cases where you actually put on a brand, the Haas corporation brand, isn't that usually done—

A. When we made shipment."

In this case it is admitted that the fuggles were accepted (ante, pp. ii, viii) but not branded by Haas (W.R. 308). Dealers ordinarily do not brand the bales before shipment (W.R. 111, 141, 308, 359) because they do not know in whose name the bales will be shipped. Thus, the Wellman fuggles here were in fact transferred to Steiner (W.R. 188-189), and Loewi shipped out the Smith fuggles in the name of another dealer (S. Ex. 30).

(c) The cluster hops were identified, appropriated to the contract and set aside. Each of the bales of hops was identified by the Government inspection

number, the warehouse number and appellant's bale number (W.R. 110).

Mr. Noakes testified that the warehouse number was on the bales prior to his inspection (W.R. 307). Speaking of the markings on the bales he said (W.R. 289):

> "There would be the warehouse lot number, and that would be put on by the warehousemen as the hops came into the warehouse."

When the bales were lined up prior to appellant's inspection the Department of Agriculture code number was put on each bale. Mr. Noakes testified:

> "It is a code number used by the Department of Agriculture to identify each lot, each lot that they sample [for leaf-and-stem content]. The grower has a code number and if he has more than one lot they are classified by letters." (W.R. 288.)
>
> "The State requires that a code number has to be on them before they will draw their samples, before they will make their inspection.
>
> Q. What is the object of that requirement?
>
> A. They want to be sure that the identifying code number is on the bale when their sample is taken.
>
> Q. So they can subsequently identify the bale and the sample together, is that correct?
>
> A. That is right. The same number has to be on this cardboard container [in which the sample is placed] as is on the bale.
>
> Q. Did you number the bales that you looked at? Did you number them on the head?
>
> A. Yes." (W.R. 307-308.)

After appellant's representatives inspected, sampled, marked and weighed the bales, the warehousemen stacked them back in the warehouse (W.R. 82). The Ray corporation is appellant's local agent (W.R. 163, 219-220; W. Ex. 3-s), and these hops were carried on the books of the warehouse as "A. J. Ray contract" hops (W.R. 75).

Appellant's particular objection (Br. 22) to this finding of fact is based upon appellant's legal argument as to its "assent". This matter is discussed in appellee Geschwill's brief, pp. 58-60.

Asserted error No. 7 (Applt's Br. 23) to finding that the seller duly performed conditions precedent. Appellant's contention is only that, "if the contract is construed in the manner advocated by the defendant," the hops did not meet the contract. For citations to the evidence supporting the Court's findings that the hops were in fact accepted, and did substantially conform to the contract, see ante, pp. xi-xiv, post, pp. xv-xxiv; ante, pp. v-viii, post, pp. xxxi-xxxix.

Finding "8. *At the time said contract was entered into, and at the time of the delivery and weighing in of the late cluster hops as aforesaid, it was an established usage and custom in the hop trade in Oregon, which was known to the parties hereto, that such weighing in of hops by the buyer following such an inspection constituted an acceptance of such hops.*[8] *The parties did not agree upon any change in or deviation from, and plaintiff did not waive, said established custom and usage.*[9] *Defendant in fact accepted said one-half of the 1947 crop of late cluster hops produced by plaintiff as aforesaid,* [10] and defendant was obligated to pay the con-

tract price therefor on or before October 31, 1947, but defendant did not then or thereafter pay said price or any part thereof."

Asserted error No. 8 (Applt's Br. 23) to finding that weighing-in the hops was an acceptance. (a) Appellant's main objection (Br. 47-52) to the finding is that not enough witnesses testified to the existence of the same custom over a sufficiently long period. In so contending appellant omits much of the relevant evidence.

The contract is dated February 7, 1944 (W. Ex. 1-A), the hops were weighed-in on September 25, 1947 (W.R. 232), and the trial was held early in 1949 (W.R. 49).

Mr. Geschwill "had experience about 10 or 12 years in hops" (G.R. 70), and had been growing his own since 1943 (G.R. 71). He testified (G.R. 116) that as long as he had raised hops the custom was that the hops were accepted when the buyer weighed them, "when they went over the scale." "The ones they rejected, they naturally wouldn't weigh them at all."

Mr. Keber, who had been familiar with the hop business for over 35 years (W.R. 130), testified he had always understood that in the hop trade the weighing-in of hops was considered an acceptance of them (W.R. 134). He also testified (W.R. 138):

> "Q. In your banking business did you act and did your bank act upon the basis of such trade practice?
>
> A. Yes. We considered hops were sold when they passed over the scales, giving them weight receipts showing the amount of hops they got."

(Both copies of the weight receipts here, prepared by Mr. Noakes at the time of the inspection and weighing, W.R. 290, are in evidence in W. Exs. 1, 2.)

Mr. Wellman, who had been engaged in the hop business since 1930 (W.R. 58), testified that in the hop business the weighing of hops was considered an acceptance, saying (W.R. 83) "that is the only way I have ever sold hops; after they went across the scales, it was delivery."

Mr. Glatt, who had been in the hop business about 20 years (W.R. 120), testified (W.R. 422-423):

> "Q. If something appears to be wrong with the bale so that the buyer does not want to accept that bale, what is the practice as to whether or not that bale is weighed and numbered?
>
> A. That bale generally is set out, and the buyer would notify the grower that that bale would not be acceptable. Frankly, I haven't had that experience.
>
> Q. But that is the usual practice?
>
> A. Yes.
>
> Q. Then, if he sets that bale out, is that bale thereafter weighed and numbered?
>
> A. Well, if he rejects that particular bale, it is not weighed or numbered.
>
> Q. It is not weighed or numbered if it is set out there?
>
> A. Correct."

Mr. Glatt testified (W.R. 126) that weighing hops constituted an acceptance of them if there was an agreement as to price and the tryings or samples

would meet the type sample. (It was agreed here that the sales price was the market price, post, p. xxiv, and the tryings did meet or were even better than the type sample, W.R. 309-311.)

No witness denied the custom of the trade that weighing was acceptance. Mr. Paulus, a buyer's agent, said that he had not received legal advice on the matter, but that it "has been so understood" that such was the custom of the trade (S.R. 252). Mr. Paulus was instructed by his principal, Hugo V. Loewi, Inc., on October 3, 1947 (G. Ex. 47) not to weigh any hops without a special agreement with the grower "as weighing them would imply that we were considering accepting these hops at some price."

(b) Appellant also objects (Br. 48) to the finding on the ground that at the time of the acceptance the parties had not received the official certificate on the leaf-and-stem analysis.

Ordinarily on large lots such as this the samples for leaf-and-stem analysis were taken at the same time that the hops were weighed in by the buyer (W.R. 415).

Mr. Ray testified the practice was that, *after* hops had been accepted by his company for appellant, those hops would be paid for as soon as the leaf-and-stem certificate was issued, "but in case the inspection certificate has not been received we are forced to wait until it has been issued so that we know how to pay." (W. R. 417.) Mr. Wellman testified to the same fact (W.R. 412).

Mr. Keber testified (W.R. 143) that hops frequently are accepted by being weighed before the

leaf-and-stem analysis is received. "That is done right along."

See also post, pp. xxvi-xxx, xxxiii.

(c) Appellant further objects (Br. 52-53) to the finding with the contention that appellant made no inspection of the hops at the time they were tendered for delivery, but that the only inspection was of the tenth-bale samples later by appellant at its Eastern office.

By telegram dated September 24, 1947, appellant advised its Oregon agent in part (W. Ex. 3-g):

> "On questionable lots require tenth bale samples and time to submit samples our customers."

By reply telegram of the same date (W. Exs. 3-h, 3-i) appellant's Oregon agent advised it, partly in code (W.R. 181):

> "Retel date. Will attempt proceed inspect sample and weigh all floor and high price contracts with distinct understanding with growers this chain [does not] constitute acceptance of hops. Cooperas [will send] inspection samples fast as possible. * * * Having seen the hops might jeopardize our position. * * *"

Appellant answered by telegram of September 25th (W. Ex. 5):

> "Retel. Suggest all contract [growers] * * * be notified by letter that inspection sampling and weighing does not constitute acceptance and that decision this question by home office will be communicated to grower later so no misunderstanding such inspection etc. can arise. * * *"

Thereupon, Mr. Ray said (W.R. 230-231):

> "* * * I drafted a letter, which was typed and sent to all contract growers, and I told them not to send it to Mr. Wellman because they were inspecting and weighing and sampling Mr. Wellman's hops that very day."

Both the fuggle and cluster hops were weighed in that day (W.R. 232). Subsequently, and apparently without even seeing the tenth-bale samples, appellant decided it wanted the fuggles but probably not the clusters (W. Ex. 3-s).

Asserted error No. 9 (Applt's Br. 24, 53) to finding that there was no agreed deviation or waiver of custom that weighing-in constituted acceptance.

Appellant denies the custom, but says that if this Court "adopts the finding" that there was such a custom, "it is acknowledged that there is some evidence that the parties did not agree upon any deviation from it." (Applt's Br. 53.)

On September 24, 1947, at Schwab's warehouse in Mt. Angel appellant took in under a "prime quality" contract the Seaman clusters which showed some mildew and had 14% leaf-and-stem content (W. Ex. 17, pp. 8-9; W.R. 329-330). Appellant denies, however, that the following day at the same warehouse it took in the Wellman clusters which showed some mildew and had only 11% leaf-and-stem content. Mr. Noakes testified (W.R. 330) that Mr. Wellman's was "the first crop that went through under the arrangement of sending in tenth-bale samples." The evidence indicates that Mr. Wellman's was the last crop taken in under the customary arrangement.

Mr. Ray's testimony. As noted ante, pp. xv-xvi, the custom was that if the hop buyer did not intend to accept hops which ran up to the type sample, the hops would not be numbered or weighed. Mr. Ray testified (W.R. 234-235) that in years prior to 1947 it was determined at the time of the inspection at the warehouse whether or not the crop as a whole would be accepted. However, Mr. Ray testified that a few days before September 25, 1947, in accordance with instructions which he had received from Mr. Frederick Haas, he instructed Mr. Noakes not to inspect and weigh in Mr. Wellman's hops without an agreement that such acts would not constitute an acceptance (W.R. 194, 231-235). Mr. Ray could not say when he received such instructions (W.R. 233). The only documentary evidence produced by appellant is that such a *suggestion* was first made to Mr. Ray by appellant on September 25th (W. Ex. 5, quoted ante, p. xviii).

Mr. Frederick Haas said (W.R. 448-451) that the instructions given Mr. Ray were covered by appellant's letter of September 16th (W. Ex. 18), but that letter says nothing about weighing-in hops (W.R. 460-461, 469).

Mr. Ray testified (W.R. 249) that he had no personal knowledge of any arrangement with Mr. Wellman. Mr. Ray also testified (W.R. 230-231) that he did not write Mr. Wellman a letter as suggested in the telegram of September 25th, and as he wrote other growers, "because they were inspecting and weighing and sampling Mr. Wellman's hops that very day."

Mr. Noakes' testimony. Mr. Noakes said that in his instructions from Mr. Ray (W.R. 324), "Nothing was said about weighing in the hops. The instruc-

tions were that we could make an inspection of both the fuggles and the clusters and draw tenth-bale samples, and weigh them, if necessary, if Mr. Wellman agreed, and then send all the samples" in to Mr. Ray's office for approval by the Haas' corporation office in the East. Mr. Noakes characterized the proposed procedure as one "that deviates from the usual custom" (W.R. 327).

Mr. Noakes then testified about his conversation with Mr. Wellman as follows (W.R. 283):

> "Mr. Wellman came to the office and said he was very anxious to get away on a hunting trip and wondered if we could not come and make an inspection of his hops, and I told him the only way we could possibly do it, as we did not have any acceptance of the type samples, I was willing to go through them, make an inspection, draw tenth-bale samples and send them for approval, and it would be in no way an acceptance of the hops."

Mr. Wellman's testimony. Mr. Wellman said he called on Mr. Noakes at his office and told him (W.R. 399), "I would appreciate it very much if we could finish this job and I could get this hop business off my mind so we can go on a real hunting trip," and Mr. Noakes said he would do everything he could "to see that the job was done" before Mr. Wellman went hunting. Mr. Wellman testified that he did not have any conversation at any time that the weighing-in of the hops would not constitute an acceptance in accordance with the usual custom (W.R. 398).

Mr. Wellman considered that the hops had been delivered and accepted—"Noakes accepted them, weighed them and marked them" (W.R. 112).

Mr. Davis, who was Mr. Noakes' assistant, and who was present at the conversation between Mr. Noakes and Mr. Wellman, did not directly contradict Mr. Wellman's testimony on this point. His only unequivocal testimony is that Mr. Wellman "asked to have his hops inspected and Mr. Noakes said that he would arrange to go through them and make his inspection" (W.R. 366). According to Mr. Davis, Mr. Noakes said, "We will have to send these [tenth-bale] samples in" (W.R. 369).

The evidence is that tenth-bale samples are always taken at the time of the regular warehouse inspection, and are always sent in to the buyer. If Mr. Wellman was told that the tenth-bale samples in this case were to be sent in, he could only understand that the transaction would be handled in the customary manner. (See particularly W.R. 418-438.)

Asserted error No. 10 (Applt's Br. 24, 54-62) to finding that appellant in fact accepted the cluster hops. See citations to evidence, ante, pp. xi et seq.

(a) Counsel say (Applt's Br. 24) this finding that appellant accepted the hops in September is "clearly erroneous" because the trial Court "found as a fact that in October, 1947, the defendant notified the plaintiff that it did not wish to take said hops." Counsel's assertion, based on some contention of retroactive, unilateral repudiation of the prior acceptance, requires no comment.

(b) Counsel also object (Applt's Br. 54-62) to the finding on the contention that when the buyer's

representatives attended at the time and place the hops were tendered for delivery, and there inspected, sampled, marked and weighed the bales, such acts did not constitute an "inspection." The evidence is to the contrary, ante, pp. ix-xiv.

Appellant contends it had a right to base its decision on an inspection of tenth-bale samples rather than of the whole crop, and to inspect such samples at a subsequent time and a different place. The legal points raised by this contention are considered in the main part of the brief, but upon the facts it is not clear that appellant even purported to base its decision upon any inspection of the tenth-bale samples.

The fuggles and clusters were both weighed-in on September 25th. On September 26th its Oregon agent forwarded the tenth-bale samples of both fuggles and clusters to appellant, saying that the hops had been weighed, inspected and sampled (W. Ex. 3-j). The samples were forwarded by express (W. Ex. 3-j). There was then an express strike and such parcels sent from Oregon in September were not delivered in the East until about October 14th (S.R. 313; S. Ex. 43). On October 10th appellant wrote its Oregon representative (W. Ex. 3-s) in part:

> "* * * We are wiring you today to take over their [Mr. Wellman's] fuggles and send the samples to us as soon as possible. * * * While we have not reached a definite decision, it is our opinion at this writing that the Wellman Clusters will have to be rejected and we will advise you further about this when we have a better line of samples on the various lots."

Then on October 18th (W. Ex. 3-u) appellant wrote its Oregon agent that it thought the cluster hops were dirty-picked though it had not received the official analysis, that "the restrictions on brewers in the use of grain has changed the picture considerably," and that "the only thing to do is to inform him [Mr. Wellman] that they [the clusters] are rejected, providing we already have taken possession of the Fuggles so that we have in this way gotten back our $20,000.00 advances."

Finding "9. There was no Federal price regulation in effect covering the 1947 crop of Oregon hops, and the price to be paid by the defendant buyer for said late cluster hops under said contract was the grower market price for such Oregon hops on the particular date selected by the plaintiff seller between the dates specified in said contract. The grower market price for such hops in September and October of 1947 was 85 cents a pound. *Said grower market price of 85 cents a pound for said late cluster hops was selected by plaintiff and communicated to defendant in a manner and at a time which was acceptable to defendant and which conformed to the prior practice between the parties.*"[11]

Asserted error No. 11 (Applt's Br. 24) to finding that the grower market price was selected and communicated at a time and in a manner which was acceptable to appellant and which conformed to the prior practice of the parties. Appellant's counsel say (Br. 24) that this finding is "clearly erroneous" because "it is undisputed that the plaintiff

did not designate any grower market price in writing as required by the contract." Contrary to counsel's suggestion, the contract provides (W. Ex. 1-A):

> "* * * the price to be paid by the Buyer to the Seller for the hops covered by this contract shall be either Forty five cents (45c) per pound or the Grower market price whichever is the higher for Oregon hops of the kind and quality covered by this contract as of that date between August 15th. 1947 and November 15th. 1947, as Seller may elect which election shall be communicated to Buyer on the day selected and confirmation of the above price to be in writing and signed by Seller and Buyer promptly upon notice by Seller to Buyer of that selected date."

In other words, an oral selection by the grower was proper, but the contract contemplated, as evidence of the fact, a written confirmation by the buyer to be signed also by the grower. Here the buyer decided to confirm orally rather than in writing.

Mr. Noakes testified (W.R. 303) that about September 11th Mr. Wellman called him on the telephone and selected the market price. They agreed upon the base price of 90 cents for fuggles and 85 cents for clusters, which were then the market prices (W.R. 71, 304). Mr. Noakes testified (W.R. 304):

> "Mr. Wellman asked if it was necessary to put it in writing, and I told him I didn't think it was necessary; that we had not done it in previous years, and it would mean a trip back home or to Mt. Angel, and I said, 'If that is okeh

with you, it is all right with me.' A good share of our business is done that way."

Mr. Ray said (W.R. 217-218), "We [the Ray company] had authority to confirm the selected price". Appellant also told the Ray company it could fix the price for clusters on market-price contracts at 85 cents on the sliding-scale basis (W. Ex. 3-f; W.R. 177-178). Mr. Wellman's selection of the growers' market price, and Mr. Noakes' confirmation thereof, were made in the same manner as in prior years under the same series of contracts (W.R. 228, 304), and the Haas corporation never refused to recognize such telephonic selections and confirmations (W.R. 229). The Ray company notified appellant of the telephonic price selection here (W. Ex. 3-q; W.R. 227-228), and appellant took the fuggles at the price so selected (W.R. 228).

Finding "10. The leaf and stem content of said late cluster hops was eleven per cent or three per cent more than the average of eight per cent recognized in the hop trade in Oregon in 1947. *According to the general custom and usage of the trade that year, which was known to the parties, such leaf and stem content was compensated for, and the grower market price was computed, by deducting one cent per pound for each one per cent that the leaf and stem content exceeded eight per cent.*[12] *The parties designated the grower market price pursuant to said contract at 85 cents per pound without reference to leaf and stem content.*"[13]

Asserted error No. 12 (Applt's Br. 24-25, 41-45, 71-72) to finding that the leaf-and-stem content was

compensated for, and the market price was computed, by deducting the sliding-scale discount. See appellee Geschwill's brief, pp. 7-9.

Appellant objects extensively on brief (pp. 24-25, 41-45, 71-72) to the finding that the market price was computed with reference to the sliding scale of premiums and discounts of one cent a pound for each one per cent of leaf-and-stem content below or above eight per cent. This matter was not mentioned among the points which appellant designated it would rely upon (compare specification No. 12, Br. 24-25, with point No. 15, W.R. 33).

(a) Appellant's first objection to the finding is the claim (Br. 42) that only its witness Mr. Ray so testified and that Mr. Ray's testimony is not sufficient to establish the fact. Contrary to counsel's representation, others of appellant's witnesses testified to the same effect.

Mr. Ray explained the matter very thoroughly:

> "There has been a custom since the advent of the OPA ceiling prices on hops to have an official analysis of every lot of hops grown on the Pacific Coast, to determine the percentage of extraneous matter, which consists principally of stems and leaves, and also the percentage of seed, because a great many contracts are for seedless or semi-seedless hops, so that the analysis is necessary, and during the period of the OPA the ceiling price was based upon the extraneous matter content of the hops. * * *
>
> "After the expiration of the OPA ceiling prices, the trade was favorable to having that practice of official analyses continued, and all contracts, I believe, provide that the determina-

tion of the picking,—that is, the leaf-and-stem content,—and also the determination of the seed content of the hops shall be decided by this inspection, which is a joint United States Department of Agriculture and Oregon State Department of Agriculture proceeding." (W.R. 197-198.)

"All contracts had sliding-scale price provisions, in one manner or another. Some contracts were written before the sliding-scale price provisions were in vogue, before they were used, but the majority of these contracts were what we call open end or market-price contracts, and where it was established that the market was 85 cents, or a certain price, on the sliding scale, why, then, that sliding scale became applicable to the contract, even though it was not mentioned in the contract." (W.R. 251.)

"* * * if they were open end [contracts] they provided for the fixing of the price, depending upon the Oregon growers' market for prime-quality hops as of a certain date, selected by the grower. Now, if on the date selected by the grower, if the market on that date was, say, 85 cents for an 8 per cent hop, that was the market we would have to apply to that contract; that is, we would have to then apply the sliding scale feature because that was the market price." (W.R. 255-256.)

Appellant's witness Mr. Eismann, local manager for the large hop dealer, S. S. Steiner, Inc., testified (W.R. 387):

"Q. Did the Steiner corporation recognize

this sliding scale in 1947?

A. We did, uniformly throughout."

Appellant's witness Mr. Noakes explained (W.R. 316) that the older contracts, such as this, which were written before the official method for determining leaf-and-stem content became established, did not specifically refer to the sliding scale, but nevertheless the sliding scale "affected those contracts when it came to the market price." Mr. Noakes stated that under such contracts the sliding scale was applied in determining the market price, "because that was the procedure or the custom in the market that year" (W.R. 317).

The parties had previously recognized the sliding scale under this same series of contracts (W.R. 63). Mr. Wellman considered that the 1947 cluster hops had been accepted (W.R. 112), and that the price to be paid was "85 cents less a cent for each pound over 8 per cent pick, and a premium for under" (W.R. 113).

Appellant itself instructed its local agent to fix the price for clusters at 85 cents on the sliding scale basis (W. Ex. 3-f; W.R. 177-178), and to apply the penalties on picking (W. Ex. 3-w; W.R. 250-251).

(b) Counsel also contend (Br. 42-44) that the contractual provision relating to the market price should not be given the interpretation placed upon it by the parties and the trade generally. This contention does not involve factual matters and is discussed in the main part of this brief.

Asserted error No. 13 (Applt's Br. 25) to finding that the 85-cent price selected was the base price before application of the sliding-scale feature. See citations to the record, ante, pp. xxvi et seq.

Appellant objects to the finding (Br. 25) first on the ground that the selected price was not designated in writing. See ante, pp. xxiv-xxvi.

Appellant's other objection is on the ground of a claimed deficiency of quality. The hops were in fact accepted, ante, pp. xi-xxiv, and they did substantially conform to the contract, ante, pp. v-viii, post pp. xxxi-xxxix.

Finding "11. *The grower market price for said hops under said contract was 85 cents per pound net weight, less 3 cents per pound deduction for leaf and stem content as aforesaid.*[14] Said hops weighed 37,638 pounds net, as determined by defendant. *The contract price for said hops was 82 cents per pound or a total of $30,863.16.*"[14]

Asserted error No. 14 (Applt's Br. 25-26) to finding that the contract price for these hops was the market price of 82 cents a pound. Appellant here only reiterates:

(a) The contention that the interpretation placed upon such contracts by the trade generally, and upon this contract by both appellant and appellee, is not correct and is not binding upon appellant. See ante, pp. xxvi et seq.

(b) The contention that the grower should have selected the market price in writing. See ante, pp. xxiv-xxvi.

Finding "12. Plaintiff duly tendered said late cluster hops to defendant in warehouse at the place specified in said contract, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for

the price. Defendant did not pay said purchase price or any part thereof. (Defendant reimbursed itself for the partial advance payment out of the fuggle proceeds, as aforesaid.) Said hops, as defendant knew, continued to be held by the warehouseman until disposed of as hereinafter stated. Defendant at all times knew it could obtain said hops upon payment of said purchase price."

Asserted error: None.

Finding "13. *When the hops were tendered to defendant and defendant had inspected the same as aforesaid, and subsequently when defendant advised plaintiff that it did not wish to take said hops as hereinafter stated, defendant did not specify any particular objection it may have had to said hops.*[15] *Upon trial defendant advanced the two specific objections that said hops showed some mildew and were somewhat above average in leaf and stem content.*[16] *Upon the facts neither claimed defect was material."*[17]

Asserted error No. 15 (Applt's Br. 26) to finding that appellant did not specify any objection which it may have had to the hops.

(a) The finding refers to the time when the hops were tendered to and inspected by appellant. Appellant objects (Br. 26) to this part of the finding with the contention that the hops were not inspected at the warehouse. This matter is first mentioned on brief and is not included in the points on which appellant said it would rely (W.R. 34, point 19). The record on the matter is summarized ante, pp. ix-xiv.

(b) The finding also refers to a time subsequent to the acceptance of the hops. Appellant admits (Br. 26) "the defendant advised the plaintiff that it did not wish to take said hops," but appellant argues that this was a rejection rather than an overture to revoke the prior acceptance. See post, p. xxxix.

(c) Appellant contends (Br. 17) that in the conversation of October 28th Mr. Noakes specified the particular grounds of picking and mildew in telling Mr. Wellman that appellant did not want to take the clusters. Some of Mr. Noakes' general testimony might support that contention, but Mr. Noakes admitted he told Mr. Wellman (W.R. 321), "I just said they were not acceptable. * * * I was assuming he knew the condition of the hops."

Mr. Davis, Mr. Noakes' assistant, said of that conversation (W.R. 357), "I don't recall that he said we cannot accept them for any certain reason, no. * * * I don't recall that he came right out and gave a reason for not taking them."

Mr. Wellman then thought they were paying him for the fuggles and the returns on the clusters would come through later (W.R. 84-85, 401). He did not then understand they were trying to repudiate the prior acceptance; rejection "was never mentioned" (W.R. 85, 91-92, 109).

Asserted error No. 16 (Applt's Br. 26-27) to finding that on trial appellant advanced the two specific objections to the hops of picking and mildew. Appellant criticizes the finding on the ground that on trial it claimed the hops showed *substantial* mildew and leaf-and-stem content.

(a) Leaf-and-stem content. The 11% leaf-and-stem content of these cluster hops was not as high as:

(1) The 14% of the mildewed cluster hops which appellant took in the day before it took in these (W.R. 329-330; W. Ex. 17, pp. 8-9).

(2) The 13% of the cluster hops which Mr. Ray admitted that appellant took in under prime quality contracts (W.R. 241).

(3) The 12% of some of Mr. Ray's own mildewed cluster hops which appellant took in and resold to breweries (W.R. 456-457; W. Ex. 17, pp. 6-7, 14-15).

The leaf-and-stem content of these hops was just the same (11%) as the leaf-and-stem content of many other cluster hops which appellant took in that year and resold to breweries, including 588 bales of Mr. Ray's own clusters (W. Ex. 17).

(b) Mildew. The record shows that hops with mildew such as these, and covered by "prime quality" contracts such as this, were as a general practice accepted in the trade that year (e.g., W.R. 116-117, 124-125, 138-139, 152-153, 241-242, 315-316, 329-330, 455-457; W. Ex. 3-w; S.R. 191; G.R. 223-224, 240-241.

Asserted error No. 17 (Applt's Br. 27) to finding that neither claimed defect was material. Both claimed defects were known before and at the time appellant inspected and weighed in the bales at the warehouse, and thereby accepted them. Both appellant's chief inspector, Mr. Noakes, and his assistant, Mr. Davis, knew of the mildew and the picking (W.R. 300, 306, 314, 318, 322, 340, 349, 360, 362, 368).

From his examination of the hops in the field and his inspection of the hops in the warehouse

Mr. Noakes testified that they were large, flaky hops, well filled with lupulin and had quite a good flavor (W.R. 314). Mr. Davis, who also saw the crop in the field and helped inspect them at the warehouse, said they were large, whole-berried hops, well filled with lupulin and had a good flavor (W.R. 360). Mr. Ray's opinion in September, 1947, as expressed to his principal, was in accord (W. Ex. 3-k), but by the time of trial he had become more critical (W.R. 182-183).

The leaf-and-stem content was compensated for by the sliding-scale feature of the market price, ante, pp. xxvi-xxix.

And see ante, pp. v-viii, xxxi-xxxiii, and post, pp. xxxv-xxxix.

Finding "14. *Plaintiff delivered the very hops which were covered by the contract and upon which defendant had made advance payments.*[18] *Said hops were of substantially the average quality of such Oregon late cluster hops actually accepted in 1947 both by the hop trade generally and by defendant under contracts containing in effect the same provisions as to quality.*[20] *Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said hops would be any different in condition or quality than said hops actually were when tendered and delivered.*[19] *Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract.*"[21]

Asserted error No. 18 (Applt's Br. 27) to finding that the grower delivered the very hops covered by

the contract and on which appellant had made advance payments.

(a) The hops delivered were the hops covered by the contract. Appellant here contends only that the contract did not cover one-half the specific crop, but rather unascertained goods. See appellee Geschwill's brief, pp. 6, 39-40, 50-51, and also ante, pp. i-ii.

(b) Appellant for the first time on brief (p. 27) questions the finding that the grower delivered the hops upon which advance payments were made. (Compare point 22, W.R. 35.) See uncontested findings, and citations to evidence, ante, pp. i-ii, iv-viii.

Mr. Noakes went through the cluster yard, saw the mildew, advised Mr. Wellman to pick, and subsequently made the picking advance. Mr. Davis also examined the cluster hops and knew the condition of the crop before and at the time of bringing out the check for the picking advance. (W.R. 72-73, 278-279, 398.)

Asserted error No. 20 (Applt's Br. 28) to finding that the hops conformed to the quality provisions of the contract as those provisions were actually applied in practice. The evidence is that in 1947 all grower-dealer contracts called for one standard grade of "prime quality" (G.R. 283-284, 357, 452, 486). As Mr. Ray said (W.R. 235), "prime quality" contracts "were the only kind of contracts they had." The evidence is also that the great part of the 83,000 bales of Oregon hops that year moved in the trade under such contracts, and that nearly all the cluster crops showed mildew (W.R. 152-153; G.R. 250-251, 269; S.R. 183-184). It seems self-evident that hops such as these were in fact accepted in the trade as "prime".

The record shows that appellant accepted cluster hops showing mildew and a higher leaf-and-stem content under "prime quality" contracts (ante, pp. v, xxxiii).

Even appellant's inspector Mr. Davis admitted that these "were an average hop" (W.R. 362). As Mr. Ray admitted (W.R. 255), the then market price of average cluster hops was the contract price selected here.

Mr. Willig, manager of the Oregon Hop Producers Cooperative, testified concerning these hops (W.R. 152-153):

> "Q. Would you say from your experience in selling hops over the years that hops of the same general character and quality of these had been accepted under this type of contract?
>
> A. Yes, they had.
>
> Q. In 1947 to whom did you sell your hops?
>
> A. Directly to the breweries.
>
> Q. Did you sell hops to breweries of the same general kind and quality as you have seen here in the courtroom?
>
> A. That is about all we had to sell that year in the form of late hops.
>
> Q. Did they accept them and make beer out of them?
>
> A. That is right."

Asserted error No. 19 (Applt's Br. 27-28) to finding that appellant did not rely on any warranty that the hops would be other than they actually were when tendered and delivered. Appellant's

argument here (Br. 28) is that it "must be conclusively presumed that the defendant did rely on the warranty".

According to the usage of the trade, and of appellant itself, the hops did conform to the contract, ante, pp. v-viii, xxxi-xxxvi, and post, p. xxxviii.

Mr. Haas, Mr. Ray and Mr. Noakes all knew of the wide-spread mildew that year "in most of the yards around the state" (W.R. 340). Before harvest Mr. Noakes knew from his own examination that there was some mildew throughout Mr. Wellman's cluster yard—"Some sections were worse than others, but there was some infection all through the yard, yes" (W.R. 300). Mr. Noakes knew that where there was such general mildew in the yard "it would show in the sample" (W.R. 318). Mr. Noakes knew that the principal factor in producing "dirty picking" is "the class of labor that is doing the harvesting." Certainly appellant with its 10% leaf-and-stem content on its own "absolutely hand-screened" hops, and Mr. Ray with his 11% and 12% picking, were aware of the picking problems that year (W.R. 465; W. Ex. 17). Appellant in fact accepted mildewed clusters with 14% leaf-and-stem content that year (W.R. 329-330; W. Ex. 17, pp. 8-9).

Appellant, knowing of the conditions, did not release Mr. Wellman's clusters from the mortgage-contract, and did not give Mr. Wellman an opportunity to sell his hops to another dealer for the then market price of 85 cents (W.R. 116; W.R. 88-89, 255).

Appellant gave its Oregon agent full discretion about making picking advances—"The matter of raising or lowering the amount to any grower is a matter entirely in your hands" (W. Ex. 3-c).

The contract (W. Ex. 1-A) provided:

> "* * * before, at or during the time of picking of said hops the Buyer shall have the right to examine the condition of the growing hops to determine whether the same are at such time in the condition in which they should be to produce the quality and/or quantity called for by the terms of this agreement; and should there be a dispute or difference of opinion [arbitration is provided for]; and if it shall be determined that the growing crop is not in condition to produce the quality and/or quantity called for by this contract, then the Buyer shall be released from any obligation to furnish money as called for by this contract; * * *"

Having examined the growing crop, and knowing the conditions then existing, the buyer made the picking advance (W.R. 398).

Asserted error No. 21 (Applt's Br. 28-29) to finding that the hops upon tender and delivery substantially conformed to the quality provisions of the contract.

These were such hops as were regularly taken in that year under similar contracts both by the trade generally and by appellant (ante, pp. v-viii, xxxi-xxxvii.

The mildew coloration of the hops did not affect the lupulin (W.R. 119, 134), and the lupulin is the valuable part of the hop (S.R. 182).

The principal test in judging hops is for flavor (G.R. 212, 429, 458, 489). Appellant's inspector Mr. Noakes found that the hops were well filled with lupulin and had quite a good flavor (W.R. 314). Appellant's inspector Mr. Davis likewise found that

the hops were whole-berried and had a good flavor (W.R. 360).

Finding "15. *Without rejecting said late cluster hops defendant advised plaintiff in October, 1947, that it did not wish to take said hops;*[22] and from time to time thereafter defendant suggested that said hops be sold to some other buyer. *The parties hereto from time to time negotiated with respect to the disposition of said hops until on or about May 3, 1948, when defendant finally renounced all liability under said contract.*"[23]

Asserted error No. 22 (Applt's Br. 29) to finding that appellant did not reject the hops. Mr. Wellman testified (W.R. 85), "There wasn't a word of rejection mentioned." Mr. Wellman then did not understand appellant was seeking to avoid the prior acceptance. He testified (W.R. 401):

> "Q. On October 28th, when this payment [the price of the fuggles less all the advances] was made, was anything said at that time about their refusing to take and pay for the clusters?
>
> A. No, it wasn't mentioned on that date. * * * Before I took the check, I asked Mr. Noakes, I said, 'Will this have any bearing on the settlement of the lates [late clusters], paying for the lates?' And Mr. Noakes said, 'Not whatsoever'. He says, 'In fact, I think it will help you,' and I said, 'I don't know—I don't want to take this check unless it is so understood.' "

Asserted error No. 23 (Applt's Br. 29) to finding that the parties continued to negotiate with respect to the clusters until May, 1948, when appellant finally renounced all liability on the contract. The

matter now objected to by appellant is not mentioned in its points which it said it relied upon (point 26, W.R. 36).

Mr. Noakes kept putting Mr. Wellman off about paying for the clusters. "He said he would keep calling the office and as quick as they got returns in from the East he would call me." (W.R. 86.) Finally Mr. Wellman was granted an interview by Mr. Ray, and they "talked over the difficulties of the season and the ups and downs, some of the experiences we had with picking and then he said, 'Otto, I will do my best' "—i.e., to "find a place" for the hops. (W.R. 86.) Mr. Ray said nothing about rejection or refusing to pay for the hops (W.R. 87).

In December, 1947, Mr. Wellman succeeded in arranging for an interview with Mr. Haas himself to see about paying for the hops. Mr. Haas, however, left town the night before, and instead of seeing him Mr. Wellman and Mr. Keber had another interview with Mr. Ray. Mr. Wellman told Mr. Ray "that I figured that Haas certainly has a moral and legal obligation to pay for these hops. Then Mr. Ray said, 'Morally so, but I wouldn't just agree with you legally; but,' he says, 'certainly we owe you morally for them,' and I said, 'I have been tied up under this contract while the market was very good and spot hops sold very rapidly during the early part of September,' and he just talked on—he said, 'I will certainly see what I can do.' " (W.R. 87-88.)

Appellant had not released the chattel mortgage on the hops (W.R. 89; W. Ex. 10), though admittedly Mr. Wellman owed appellant nothing. If the price of hops had gone up, appellant could have demanded the right to take the hops at the contract

price. The market price, however, continued down, and finally Mr. Ray in May, 1948, refused to pay for the hops and consented to release them so that they could be resold. (W.R. 88-89, 135-136.)

Finding "16. Hops are of a perishable nature; *there had been a material decline in the general market price and demand for 1947 Oregon late cluster hops;*[24] and the hops here involved could not readily be resold. On May 7, 1948, after defendant had been *in default*[25] in the payment of said price an unreasonable time, plaintiff after notice to defendant, and without waiving his rights against defendant, sold said hops to another buyer at a total price of $11,904.31, which was the best price then obtainable therefor. Defendant consented to such resale. Said resale price was properly credited against the sum then due from defendant, and the *balance remaining due* was as follows:

Amount due from defendant on October 31, 1947	$30,863.16
Interest thereon to May 7, 1948, at 6% per annum	956.25
Amount due on May 7, 1948	$31,819.41
Proceeds of resale on May 7, 1948	11,904.31
Balance	$19,915.10[25]

No part of said balance has been paid."

Asserted error No. 24 (Applt's Br. 29) to finding on the decline in price and the limited market. Mr. Wellman resold these hops in May, 1948, for 31 cents a pound, which was then the fair price for them (W.R. 91, 371). These hops brought more than Mr. Ray's clusters which were sold about the same time (W. Ex. 17, pp. 14-15).

As to the decline in price for good, average-quality 1947 seeded clusters from 85 cents in September, 1947 (W.R. 255), to 31 cents in May, 1948, and as to the limited market, see appellee Geschwill's brief, pp. 17-18, and Appendix thereto, pp. xxii-xxiii.

Asserted error No. 25 (Applt's Br. 30) to finding that appellant is in default in payment of purchase price. Here again appellant has specified as asserted error matter not included in the points on which it stated it relied (compare point 29, W.R. 36). Appellant's contention is that, "if this contract is construed in the manner advocated by the defendant," the hops were not of sufficiently perfect quality. The hops were accepted (ante, pp. xi-xxiv), and were of acceptable quality (ante, pp. v-viii, xxxi-xxxix).